... many a parallel in papers prepared by inexperienced patent solicitors. ... in all seriousness for the Patent Office, equally silly productions, and the ... we reproduce it here.



NEW AND INGENIOUS READY ACTING DOG TAIL AND GUN BARREL ATTACHMENT, FOR SPORTING PURPOSES. PATENT PENDING.

...CIFICATION.—I claim the dog's tail, and the extra sized trigger, and the trigger guard, also the combination of the trigger and dog's tail, also the ... dog, and the general application in the manner substantially and for the purpose described.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA.

BY NATHANIEL BENNETT,

ONE OF THE JUSTICES.

VOL. I.

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S. W. BENEDICT'S POWER PRESSES.

JUSTICES OF THE SUPREME COURT.

S. C. HASTINGS, *Chief Justice.*

H. A. LYONS,
NATHL. BENNETT,* } *Justices.*

DISTRICT JUDGES.

FIRST DISTRICT,
O. S. WETHERBY.

SECOND DISTRICT,
HENRY A. TEFFT.

THIRD DISTRICT,
JOHN H. WATSON.†

FOURTH DISTRICT,
LEVI PARSONS.

FIFTH DISTRICT,
CHARLES M. CREANER.

SIXTH DISTRICT,
JAMES S. THOMAS.‡

SEVENTH DISTRICT,
ROBERT HOPKINS.

EIGHTH DISTRICT,
WILLIAM R. TURNER.

NINTH DISTRICT,
WINFIELD S. SHERWOOD.

JAMES A. McDOUGALL, *Attorney General.*

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* Resigned in October, 1851, and the Hon. HUGH C. MURRAY appointed in his place.

† Resigned in the former part of the year 1851, and the Hon. Mr. HESTER appointed in his place.

‡ Removed from the State, and the Hon. TOD ROBINSON appointed in his place.

PREFACE.

In presenting to the public the first volume of California reports, it may not be improper to preface it with a brief account of the condition of things in California previous to the organization of the state government.

All the other states of our confederacy had, previously to their admission into the union, an established government, on which their state organizations were based. The people of California, however, were driven by extreme necessity, growing out of the political and legal chaos in which they found themselves, to the formation of a state government. A large amount of labor, consequent upon the unorganized state of society, was necessarily imposed upon the tribunal of last resort—the labor of searching for authorities in an unfamiliar language, and an unfamiliar system of jurisprudence; of ascertaining the law, as laid down in the codes of Spain; in the royal and vice-royal ordinances and decrees; in the laws of the imperial congress of Mexico; in the acts of the republican congress; in presidential regulations; in decrees of dictators, and acts of pro-consular governors. Many ordinances and decrees, claimed to have the force of law, had not been printed even in Mexico; and they, as well as all other books upon Spanish and Mexican laws, could be procured only with great difficulty and at great expense, and, indeed, at first, they could not be procured at all. In addition to these causes of embarrassment, great doubts were entertained as to the force, as a rule of decision, which the laws of Spain and of Mexico, never but partially enforced in the remote province of California, should have, after the acquisition of the country by the Americans, in the construction of contracts made between American citizens, who had settled in California in such numbers as greatly to exceed the native population.

California was, at first, a missionary territory. As auxiliary to the *Missions*, *Presidios* (Forts) were established, and *Pueblos* (agricultural villages) were established in the neighborhood of the *Missions* and *Presidios*, with the two-fold object of providing supplies for the Presidios, and of establishing colonies of Indian *Neophytes*. In these *Pueblos* and *Missions*, converted Indians and discharged soldiers, in addition to other *Pobladores*, were settled. These colonies were on the out-skirts of civilization. They needed but few laws. The government was of a patriarchal character, little regard being paid to the strict letter of the laws, either of Spain or Mexico.

Such was substantially the condition of things in California under the Spanish rule. With the revolution, which severed Mexico from the Spanish

Crown, came disorder and disorganization. The Missions were broken up; the Presidios, neglected; and no new system was adopted and enforced in place of the one which had fallen into disuse. Land had never been, previously to the acquisition of the country by the Americans, of much value. The wealth of the colonists consisted principally in their cattle and horses, which were sold for a trifling sum. During the disorders which characterized the Mexican *régime*, land can be said to have had scarcely any value—at all events, not a value worth the trouble and expense of procuring a perfect title under the colonization laws of Mexico and Spain. No mail facilities were enjoyed—long journeys had to be made to the capital of the province, in the midst of civil disorders and revolutions, in order to procure a perfect title. Men could not always, perhaps but seldom, be found, who were capable of making the necessary surveys. This condition of things led, in some cases, without taking any steps to obtain a title, in others, after having taken only the incipient proceedings, to the practice of taking possession, or at least of claiming, large tracts of land which had not been surveyed, and the boundaries of which were undefined, and even unknown. This system continued until the conquest of the country—until the discovery of gold—until the Americans thronged into northern California, a portion of the country which could be said previously to have contained scarcely any population except Indians. A sudden change then took place; land became valuable; towns sprung up, and, to supply the population, agriculture was found to be one of the most lucrative employments. Americans, desirous of cultivating the earth, rather than of mining or engaging in commercial or professional avocations, did not hesitate to take possession of such agricultural lands as they found wild and vacant, notwithstanding the lands might have been claimed as a portion of some large *ranch*. In the towns, extensive speculations had been carried on in lands which were claimed to have been granted by American Alcaldes, after the American forces had taken possession of the country. Questions involving immense amounts of property, and of pervading interest to the public, came up for adjudication, and the courts were asked to usurp the functions of legislators, and declare papers to constitute a title, which were absolutely void. Difficulties occurred in determining the jurisdiction and powers of judges of First Instance, Alcaldes, Justices of the Peace, and Ayuntamientos. Destructive fires desolated the city of San Francisco, where the sessions of the court were held. Records and papers were destroyed, or lost. Libraries, which had been collected at great cost, were burned, and confusion and disorder were the inevitable result.

Before the organization of the state government, society was in a disorganized state. It can scarcely be said that any laws were in existence further than such as were upheld by custom and tradition. This was the case more particularly in Northern California and in the mineral region—in Southern California, perhaps, to a less extent. Commercial transactions to an immense amount had been entered into, and large transactions in real estate had taken place between Americans, with reference to the Common Law as modified and adminis-

tered in the United States, and without regard to the unknown laws of the republic of Mexico, and the equally unknown customs and traditions of the Californians; and the application of the strict letter of Mexican law in all cases, would have invalidated contracts of incalculable amount, which had been entered into without any of the parties having had the means of knowing that such laws ever existed.

It is believed that judges of First Instance were never appointed and never held office in California under the Mexican *régime*, but that Alcaldes possessed the powers and jurisdiction of judges of First Instance. The Alcaldes, before the annexation of the country, it is believed, certainly afterwards, to a great extent, both made and enforced the law; or, at least, they paid but little regard either to American or Mexican law further than suited their own convenience, and conduced to their own profit. The supreme court was called upon to pass upon but few cases on appeal from Alcaldes' courts, but on many from courts of First Instance. The judges of these courts, appointed by General Riley, then military governor of California, being common law lawyers and not acquainted with Mexican or Spanish law, further than they could gather it from a small pamphlet translated and published by order of General Riley, conducted their proceedings, for the most part, according to the Common Law, or the statutory regulations of the several states from which they respectively came, and their decisions were generally based upon Common Law grounds.

In the supreme court, on appeal, it was necessary to take into consideration, so far as might be done, without infringing positive statutory, or clearly defined and settled law, the peculiar and anomalous condition of the country, of the government, of the state of society, of the old citizens of California, and of their American invaders. This the court always endeavored to do, sometimes, perhaps, ineffectually.

The initiatory step taken towards reducing chaos to order, was the formation of a state constitution. This was in the autumn of 1849. On the 15th day of December, 1849, the first legislature under the constitution met at San José, and, under most discouraging circumstances, accomplished an amount of labor, which few legislatures, in the same space of time, ever accomplished. In pursuance of a clause in the constitution, the first judges of the supreme court, and of district courts were appointed by this legislature. The state was divided into nine judicial districts, for each of which a district judge was appointed. The terms of the supreme court were appointed to be held at San Francisco. Appeals to the supreme court were authorized from courts of First Instance, from district courts, and, in certain cases, from Alcaldes; and the practice was prescribed by which such appeals should be carried up. The following volume embraces the decisions of the supreme court on such appeals.

A statute of the state authorized the supreme court to appoint a reporter, and it appointed Edward Norton, Esq. He had, as early as May, 1851, advanced far in the preparation of a volume of reports, but his manuscript was destroyed

in the fire of May 4, 1851. He then resigned his office, and the undersigned, by the advice of his associates on the bench, assumed the task of reporting the decisions. By another statute, the decisions of the court, in *all* cases, were required to be given in writing, and, by another statute, *all* decisions were required to be reported. The following volume embraces *all* the decisions of the court, from its first organization in March, 1850, to the end of the June term, 1851, together with one case decided at the October term, 1851.

Such are the reasons why the undersigned presents to the members of the profession in California, the following volume. I have here to acknowledge the obligations I am under to WM. S. REESE, Esq., for the assistance he has given in the preparation of the work for the press, particularly of the index, the merits of which, if there be any, should be principally ascribed to him, and for the faults in which, if there be any, he must be chiefly responsible; also to Hon. R. A. WILSON, one of the judges of First Instance in Sacramento district, for his treatise upon the Alcalde system in California, and the Mexican Appellate Court, and San Francisco and its Provisional Government, which he has furnished me for the purposes of this work. I have also thought proper to insert in the appendix the report upon the Common Law made by a committee of the first legislature, as illustrative of the condition of things in California at the meeting of the first legislature, and of the efforts made to procure the adoption, on the one hand, of the Common, and, on the other, of the Civil Law system of jurisprudence.

NATHL. BENNETT.

SAN FRANCISCO, 1851.

CASES

REPORTED IN THIS VOLUME.

APPENDIX.

ERRATA.

Page 121, line 35, for "*Feero*," read "*Fuero*."
" 168, line 29, for "Chandler," *read* "Dennison."
" 179, line 16, for "now," *read* "new."
" 207, line 3 of head note, for "*presenti*," read "*præsenti*."
" 210, line 22, for "*presenti*," read "*præsenti*."
" 224, line 32, for "consequent," *read* "consequence."
" 406, line 23, for "*John*," read "*James*."
" 451, line 5, for "plaintiff's," *read* "defendant's."
" 503, line 18, for "*Ordamiento*," read "*Ordanamiento*."
" 505, lines 4–5, for "*probando*," read "*probanda*."
" 520, line 29, paper "('A')," not furnished to reporter.
" 521, line 14, paper "('B')," not furnished to reporter.
" 576, line 13, strike out "written."

Lorenzo Sawyer

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA,

IN MARCH TERM, 1850.

THE PEOPLE *vs.* SMITH, *et al.*

It is too late to raise an objection to an affidavit or warrant of arrest on a criminal charge, after the examination of the prisoner has been had, and it appears that there is probable cause to suppose that he is guilty of felony, and an order of commitment has been made by the committing magistrate. So held upon an application to discharge a prisoner on *habeas corpus.*

If it appear on the examination of a person before a committing magistrate, that the prisoner is guilty of felony, although different from that specified in the warrant of arrest, it is the duty of the officer to commit the prisoner for trial, for the offence of which he appears to be guilty.

If an order of commitment be sufficient in substance, it will be held good on *habeas corpus*, although it contain more than is necessary to be stated therein. The unnecessary matter will be regarded as surplusage.

Courts will take judicial notice of the territorial extent of the jurisdiction and sovereignty, exercised *de facto* by their own government, and of the local divisions of the country into states, counties, cities, towns, &c.

Judges of First Instance have jurisdiction to act as examining and committing magistrates.

The justices of this court and the district judges, being made by the constitution of the state conservators of the peace, are *ex vi termini*, empowered to act in the apprehension and commitment of offenders. *Per* BENNETT, J.

An affidavit made upon information merely, is entitled to but little weight in any legal proceeding. *Per* BENNETT, J.

Upon a return to a writ of *habeas corpus* it is proper for the court to look into the depositions taken before the committing magistrate, in order to ascertain whether there is probable cause to suppose that a felony has been committed by the prisoner.

Where it appeared on the return to a writ of *habeas corpus* that there was reasonable ground to believe that the prisoners were guilty of burning certain Indian lodges in the Nappa Valley, and of killing several Indians, and perpetrating other outrages, they were, nevertheless, admitted to bail, on the grounds solely that the district courts had not as yet been organized, nor their terms fixed, nor the judges appointed, and that there was no secure place in which the prisoners could be kept until they could be brought to trial. *It seems*, had not these reasons existed, the prisoners would have been remanded to the custody of the sheriff.

THE facts are sufficiently stated in the opinion of the court. The cause was argued by

C. D. Semple and *John B. Weller*, for the applicants, and by

C. J. C. Kewen, (attorney general,) for the people.

By the Court. BENNETT, J. This case comes up on the petition of the defendants to be discharged from the custody of the sheriff of the district of Sonoma, under a writ of *habeas corpus* heretofore issued by this court. The return of the sheriff shows that the petitioners are detained by him by virtue of an order of the judge of First Instance of the district of Sonoma, and that such order was made upon the return of a warrant of arrest against the defendants, charging them with the commission of various felonious acts. Accompanying the return of the sheriff is also to be found a large amount of testimony taken on the examination, going to show that several Indians in the Nappa Valley were shot on the 27th day of February last, their lodges burned, and a considerable quantity of wheat, barley, and other property destroyed, and tending to fix the perpetration of these acts upon the petitioners.

It is claimed by the counsel for the accused: 1st. That the affidavit upon which the warrant of arrest was issued, is defective. 2d. That the order of commitment is irregular and illegal. 3d. That it does not appear that any offence has been committed within the state of California. And 4th. That a judge of First Instance cannot exercise the powers, which the officer has, in this case, assumed. These are in substance the grounds

upon which it is claimed that the prisoners should be discharged.

First. It is claimed that the affidavit in pursuance of which the warrant was issued is defective, because it is alleged to be upon information merely. If this were so, we should feel disposed to regard it as of but little value, for an affidavit which states no fact within the *knowledge* of the person making it, can be of but little weight in any legal proceeding. But we understand the affidavit in question to set forth in positive terms as within the knowledge of the deponent, the commission of the offences charged therein, and to proceed upon information as to the *names* only of the persons who were guilty of the perpetration of them. We think that the fact upon which the argument of counsel is based, does not exist; but even if it did, we are of opinion that it is now too late to raise the objection. The preliminary evidence upon an application for a warrant of arrest may be either by the affidavit of some person cognizant of the facts, or by his examination under oath taken by the officer; and is for the purpose of satisfying the person to whom the application is made, that there is reason to believe that a felony or other crime has been actually committed, without which no warrant should issue; as also to prove the cause and probability of suspecting the party against whom the warrant is prayed. (4 *Stephen's Comm.* 356.) If in pursuance of preliminary proof charging a particular offence a warrant be issued,and the accused be brought before the magistrate, and upon examination it be found that he has been guilty of some felonious act, though different from that charged, it is nevertheless the duty of the examining officer to commit him for trial for the offence which it thus appears there is probable cause to suppose he has committed. The only period at which the defendant can avail himself of any defect in the affidavit, is previous to the examination and final order of commitment. In this case, no defects in the affidavit would authorize a discharge of the prisoner.

Secondly. The objection to the several orders of commitment is, that it is required by them that the defendants stand committed to the custody of the sheriff " till discharged by the

"judge of the district court of said district of Sonoma at the "next first term of said court to be held in and for said district, "by virtue and in pursuance of the statute laws now passed or "which may hereafter be passed by the legislature of the state "now in session." It is claimed that this authorizes an indefinite imprisonment, inasmuch as the district courts are not yet organized, and the district judges not yet appointed. The order, it is true, might have been drawn up with a greater degree of formality and technical accuracy. It would have been better expressed, if it had authorized the commitment of the defendants until discharged by due course of law. At the same time, we are of opinion that the order is substantially sufficient, and can in reality work no prejudice to the prisoners; for their case will unquestionably be laid before the first grand jury, which will meet in Sonoma, and will then be disposed of. It is in effect an order of commitment for trial, authorizing the detention of the defendants until their cases can be presented before a tribunal regularly constituted, with prescribed powers, proceeding according to an established practice, and competent to pronounce a final judgment either of acquittal or conviction. In the midst of the doubts as to the proper limits of the jurisdiction of courts of First Instance, and the want of regularity in proceedings before them, owing to their powers and practice not being sufficiently defined by law, we cannot say that the committing officer acted illegally, or unwisely, or to the prejudice of the defendants, in requiring, in his order, their commitment until the establishment of the new system and the organization of the new courts. The addition to the order of the clause in relation to the laws under which the defendants may be tried by the district court, cannot be considered as either enlarging or diminishing the power or jurisdiction of the district court. It should be regarded as mere surplusage, which can, in no respect, vitiate—and striking this out, we have simply an order committing the defendants for trial at the next district court.

Thirdly. It appears from the order of commitment that the offence charged was committed in "Nappa Valley at and about "the ranch of Henry Fowler and William Hargrave in said val-

"ley." It is not necessary that it should be stated that Nappa Valley is in the state of California. Courts take judicial notice of the territorial extent of the jurisdiction and sovereignty, exercised *de facto* by their own government; and of the local divisions of their country, as into states, provinces, counties, cities, towns, or the like, so far as political government is concerned or affected. (*Greenleaf on Ev.* 8.) And we recognize judicially that Nappa Valley is embraced within the territorial limits of this state, the same as we should, that San Francisco is included within its boundaries, if an offence were charged to have been committed there.

Fourthly. It is claimed that a judge of First Instance cannot act as an examining and committing officer. We think otherwise. Judges of First Instance are invested with a criminal as well as a civil jurisdiction, (*Art.* 2, § 2, *of part* 2, *of law of May* 23, 1837, *and art.* 9, *of same law*,) and are empowered not only to try criminal causes, but also to act in the preliminary proceedings of arrest and commitment for trial. This power they have uniformly exercised since the acquisition of California by the United States government; and we deem it a part of their duties as conservators of the peace in the districts over which their jurisdiction extends. It was conceded upon the argument that they were conservators of the peace, but it was contended that the power of such officers does not extend to the arrest and commitment of persons charged with the commission of crimes. Before the institution of the office of justice of the peace in England, the public order was maintained by officers who bore the name of conservators of the peace, (4 *Stephen's Comm.* 37, 38;) and they were empowered to preserve the peace, to suppress riots and affrays, to take securities for the peace, and to *apprehend and commit* felons and other inferior criminals. (*Id.* 43.) The same power is conferred upon a variety of officers in England and the United States by simply declaring them by statute to be conservators of the peace; and the constitution of this state confers the same authority in the same terms, upon the justices of this court and the district judges. Being conservators of the peace, the judges of First

Instance may legally act in the apprehension and commitment of offenders against the law; and the proceedings before us are not invalid upon the ground of want of jurisdiction in the officer who made the commitment.

There are in addition to the views already taken of the case, reasons which render a discharge of the prisoners improper. The depositions taken before the judge of First Instance have been returned, and we think that enough appears in them to require that the defendants should be put upon their trial. It is a general rule, that upon application to bail or discharge upon *habeas corpus*, the court will look into the depositions, and, without regarding the regularity or irregularity of the commitment, will remand, discharge or bail the prisoner, according to the circumstances of the case. The court, in such case, pronounces no judgment, whether the facts amount to felony or not, but merely whether enough is charged to justify a detainer of the prisoner, and putting him upon his trial. Even if the commitment be regular, the court will look into the depositions, to see if there be a sufficient ground laid to detain the party in custody, and if there be not, will discharge or bail him. So, on the other hand, if the warrant of commitment be informal, they will not discharge or bail the prisoner, without first looking into the depositions, if any be presented, to see whether there is sufficient evidence to detain him, and if the matter appear to be such as would require his detention; or his finding sureties, he will be bailed or committed accordingly, and not discharged. (1 *Chitty Crim. Law*, 92, 93, 94.)

For these reasons, the court cannot grant the prayer of the petitioners for their discharge. If the district courts were fully organized, and their terms prescribed and known, we should, perhaps, not deem it within the proper exercise of a sound discretion to bail them; but considering the want of definite and well understood laws regulating proceedings in the existing courts of First Instance, and the uncertainty as to the time when the district courts will be ready to proceed with business, superadded to the fact that there is no jail or prison in which prisoners can be kept with security, we feel disposed to order their

release upon bail. The defendants must, therefore, enter into a joint recognizance with at least two good and sufficient sureties in the sum of ten thousand dollars, that they will appear and answer to any indictment which may be presented by the grand jury of the district of Sonoma for the offences charged against them in the several orders of commitment, from which they have petitioned to be discharged; or either of them may enter into a recognizance in the sum of three thousand dollars, with at least one good and sufficient surety, to the same effect. In either case the sureties must be approved by the judge of First Instance of the district of Sonoma, or by one of the justices of this court, upon satisfactory proof that they are each worth double the amount specified in the recognizance over and above all debts, claims, and demands. Upon entering into such recognizance, either of the prisoners will be released from further detention. In case of failure to enter into such recognizance, they must be remanded to the custody of the sheriff of Sonoma, to be by him kept until discharged by due course of law.

LUTHER, respondent, *vs.* THE MASTER AND OWNERS OF SHIP APOLLO, appellants.

This court has no jurisdiction of an appeal from the court of First Instance, where the judgment appealed from is for less than the sum of two hundred dollars; and where an appeal was brought from a judgment of $166 80, it was ordered that the appeal should be dismissed with costs.

THE facts are sufficiently stated in the opinion of the court. The cause was argued *ex parte*, by

Horace Hawes, for the appellants.

By the Court, HASTINGS, Ch. J. This was an action instituted before the court of First Instance for the district of San Francisco, for the recovery of seaman's wages, amounting to the sum of $166

80, and judgment was rendered for the appellee in the sum of $100.

The 4th sec. of the 6th art. of the constitution of this state, provides that, "The supreme court shall have appellate juris-" diction in all cases where the matter in dispute exceeds two " hundred dollars, when the legality of any tax, toll, or impost, " or municipal fine is in question."

The matter in dispute was the recovery of $166 80, and the question is at once suggested whether this court has jurisdiction. If it had been intended by the framers of the constitution to give this court jurisdiction in cases in which the amount in controversy was less than $200, pending before the adoption of the constitution, and the enactment of laws repealing the then existing laws, exceptions would have been incorporated into that instrument to that effect. It does not appear that the 1st, 2d, and 3d sections of the schedule will confer jurisdiction in such cases. The 1st sec. provides that, "all laws in force at the " time of the adoption of this constitution, and not inconsistent " therewith, until altered or repealed by the legislature, shall con-" tinue as if the same had not been adopted." It seems to be inconsistent with the provision of the constitution above quoted, to entertain jurisdiction in a case where the amount in dispute is less than $200. The 3d sec. provides, among other things, that the laws relative to the duties of the several offices then existing, shall not be changed until the entering into office of the new officers to be appointed under this constitution. The justices of this court are officers appointed under the constitution, and ought not to exercise any other judicial functions than those conferred upon them by the constitution itself, and the laws of the land consistent therewith. It is therefore but reasonable to infer, that the legislature in the 3d sec. of the act of 28th of February, intended only to transmit to this court all such appeals from the courts of First Instance, in which the amount in controversy shall exceed in value the sum of $200. It seems very doubtful whether the court of Second Instance, to which this case was appealed, could entertain jurisdiction if such a court were now in existence. By the 12th art. of sec. 2d, part 2d, *Halleck's*

Translation and Digest of Mexican Laws, it is declared, " that in the trial of causes which exceed $100, but do not exceed $200, the judges shall take cognizance by means of a written process according to law, but without appeal, except the laws have been violated which regulate the mode of proceeding." From which we infer that the courts of First Instance, so long as they comply with the ordinary rules of practice, and do not violate the laws regulating practice in their courts, have exclusive jurisdiction in all controversies where the matter in dispute shall not exceed $200, and shall exceed $100; and no court can review by appeal their judgments in such cases.

Entertaining these views, we do not think it our duty to encourage appeals into the supreme court of this state, when the amount in controversy is of the character presented by this re cord.

The appeal, therefore, is ordered to be dismissed at the cost of the appellant.

Lyons, J. concurred.

Bennett, J. (dissenting.) I do not doubt that the court of Second Instance, under the Mexican system of laws, would have had jurisdiction of this appeal. It may be conceded that no appeal would lie, except where the laws had been violated, which regulate the mode of proceeding. But this appeal is brought for the very reason that the laws have been violated which regulate the mode of proceeding. Without entering into a minute examination of the different clauses of the constitution, I will merely say, that taking all the provisions which bear upon the point under consideration together, they confer upon this court appellate jurisdiction over judgments rendered in the court of First Instance, in all cases where the court of Second Instance, under the Mexican system, would have had such jurisdiction. I think that the appeal should be entertained, and dissent from the conclusion to which the majority of the court have arrived.

LADD vs. STEVENSON & PARKER.

Where a complaint alleges that the plaintiff was in the quiet and peaceable possession of premises, and was dispossessed by the defendants, by force, or under an illegal order made by an officer having no jurisdiction, the answer should take issue directly upon the allegations of the complaint, or, confessing them, should state, distinctly and positively, new matter sufficient to avoid them.

It seems that under the Mexican system, alcaldes, *alone*, have no judicial power whatever. *Per* LYONS, J.

A person cannot be dispossessed of his property under an order of a court, proceeding *ex parte* on the statement of the plaintiff, and without citation or notice to the defendant. *Per* BENNETT, J.

Ch. J. HASTINGS dissenting from the conclusion to which the majority of the court arrived.

ON the 8th day of February, 1850, Wm. Ladd, the plaintiff, filed his complaint before Wm. B. Almond, judge of First Instance in and for the district of San Francisco, alleging that on the 4th day of February, 1850, he was in the quiet and peaceable possession of certain premises in the city of San Francisco, and that on that day the defendants Stevenson & Parker made application to John W. Geary, First Alcalde of the Jurisdiction of San Francisco, for an order to remove the plaintiff from the premises. The complaint further alleges, that under and by reason of an illegal writ, issued by the alcalde, on an illegal order made by him on such application, one Towns, the bailiff of the alcalde, forcibly dispossessed the plaintiff of the premises, and delivered the possession thereof to Stevenson & Parker. The plaintiff also alleges that he never had any notice, direct or indirect, verbal or written, of the application for the said order, or the issuing thereof, until the same was executed. The prayer of the complaint is, that the order of the alcalde may be set aside, and that the plaintiff may be restored to the possession, and may recover damages for the forcible and illegal entry of the defendants. A copy of the writ issued by the alcalde was annexed to the complaint.

The defendants, Stevenson & Parker, put in their answer,

the only material part of which, (if, indeed, any portion of it can be said to be material,) is *verbatim* as follows: "And for "answer, these defendants say that the writ set forth in the "said petition and copy thereof annexed to same, was issued "at the application of these respondents, and the facts stated to "have been ascertained by the said alcalde were and are true. "These respondents represent that as partners they are the legal "owners of the real estate set forth and described in said peti- "tion, and that they were in the quiet and peaceable possession "of the same until the said Ladd, with force and violence, at- "tempted to take possession thereof; that before he entered "on said real estate, which he did as a trespasser, the agent of "respondents requested and forbid him doing so, and repre- "sented to him that the property belonged to your respondents, "and was in their possession and under his control, for in that "notwithstanding he entered with his house, and commenced "building, and placed some lumber upon the same, which, in "pursuance of the alcalde, was removed therefrom without any "injury thereto. Having fully answered, pray the court to dis- "miss said petition."

To this answer the plaintiff put in exceptions in the civil law mode of proceeding, on the ground that the answer did not except to, nor in anywise contest, the allegations in the petition; that the order of the alcalde was void for want of jurisdiction, and that the plaintiff had no citation or notice to appear before the alcalde, but that the answer relied solely upon matter, which was wholly irrelevant.

The cause was heard in the court of First Instance on the complaint, answer and exceptions, and judgment was rendered in favor of the defendants. The plaintiff appeals from that judgment.

Horace Hawes, for plaintiff.

Hart & Shaw, for defendants.

By the Court, LYONS, J. This is an action instituted [illegible]

tiff to recover possession of certain lots of land, from the quiet and peaceable possession of which, it is alleged, he was ousted by the defendants, acting under and by authority of an order issued by the First Alcalde.

The petition alleges that on and before the fourth day of February, plaintiff was in lawful, quiet and peaceable possession of the lots described, and that on said day defendants and others, claiming to act under an order of the first alcalde, entered forcibly on the premises and ousted him from such possession; and he prays to be reinstated therein.

The answer sets up, that defendants were and are the legal owners of said lots, and that previous to the entering of plaintiff thereon, which he did with force and violence, they were themselves in possession. Plaintiff filed in the court below exceptions to the answer, in the nature of a demurrer, on the ground that it neither denied, nor confessed and avoided, any of the material allegations of the petition. The court overruled the exceptions, and rendered judgment in favor of defendants; from which ruling and judgment plaintiff appeals.

The answer certainly does not take issue upon any of the material allegations in the complaint, neither does it admit the allegations to be true, and seek to avoid them by new matter set up in avoidance, one of which should have been done. It attempts to change the whole nature of the investigation by tendering a new and distinct issue, and making the material question to be tried, not whether Ladd, at the time he charges, was in the quiet and peaceable possession of the premises, and was ousted by Stevenson & Parker, under the illegal order of the alcalde, but whether Stevenson & Parker were at some previous time in possession, of which they were illegally deprived by Ladd. This is clearly not the issue that should have been presented. If the defendants, being in quiet possession, were deprived of it by Ladd, as alleged, a court of competent jurisdiction would have afforded the means of redress; of this they seem to have been aware, but mistook the proper court. The alcalde, at whose hands this redress was sought, has, *alone*, no judicial power whatever. (*Feb. Mej. art.* 35, *fol.* 371, § 35;

Id. fol. 365, § 16; *Digest Mex. Laws*, § 3, *art.* 14, *fol.* 23.) Nor can the jurisdiction of that officer be extended or enlarged by consent of parties. With certain exceptions, of which this case is not one, every suit must be brought before the judge of First Instance. (*Escriche, fol.* 238; 4 *Feb. Mej.* 381–2; *Id. 5th, fol.* 134; 3 *Pandectas Hisp. Mej. fol.* 221, *art.* 88; *Escriche*, 263–4; *Sala*, 360, § 11; *Id.* 364, § 13; *Dig. Mex. Laws, fol.* 20, *art.* 9.) But if parties *could* confer jurisdiction, it does not appear that in this case plaintiffs tacitly or otherwise consented to do so. The proceedings before the alcalde were *ex parte*; Ladd was not cited, nor did he appear to defend his interests in the court whence the order issued.

When a party is in quiet and peaceable possession of lands, the law will not sanction any invasion of his rights by force. We think the order of the alcalde, being illegal, was null and void, consequently the acts of Stevenson & Parker must be viewed as if no such order had issued, and the dispossession of Ladd was a forcible entry. When he has been restored to the possession of which he was thus improperly deprived, it will then be time to try the issue sought to be presented in the answer of defendants, whether at some period previous to the 4th of February they were in quiet possession, and were deprived thereof by force.

To hold any other doctrine would be to declare that a party might with force and violence oust a possessor, and when he sought to be reinstated, in the manner pointed out by law, require him to exhibit a good and perfect title before he could be restored to the rights of which he had been illegally deprived.

It is therefore ordered, adjudged, and decreed, that the ruling and judgment rendered in the court of first instance be annulled, avoided and reversed, that there issue an order of repleader, commencing with the answer of defendants; so as to present for trial the question whether Ladd was in peaceable possession of the property at the time he was ousted in the manner set forth in petition. Appellees paying costs of this appeal.

Bennett, J. The order made by the alcalde was void for his failure to acquire jurisdiction over the person of the defendant. This summary method of putting a person out of possession of premises, of which he is in the quiet and peaceable occupation, on an *ex parte* statement, and without citation, or notice in any way of the proceedings, is a novel mode of administering justice, to which I cannot give my assent. The alcalde's order being void, the allegations of the complaint are simply, that the plaintiff, while in the peaceable occupation of premises, was violently dispossessed by the defendants. That makes out a sufficient cause of action to entitle the plaintiff to be restored to the possession, and requires the defendants either to deny such allegations directly and unequivocally, or to confess and avoid them. They have done neither; but instead thereof, have inserted in their answer a confused and unintelligible statement of something, in a manner unknown to any system of pleadings with which I am acquainted. I think the judgment should be reversed with leave to the defendants to apply to the district court of San Francisco to amend their answer on such terms as the court shall deem proper.

Hastings, Ch. J. (dissenting.) I concur with the majority in that part of their opinion which declares the proceedings before the alcalde void; also in that part which refers to the issue that should have been formed and tried in the court below; but I cannot assent to those parts of the opinion which represent that the respondents, by their answer, admitted the quiet and peaceable possession of appellant as averred in his petition. The appellant, on his part, represents that on a day mentioned he was in the quiet and peaceable possession of the premises in controversy, which, if true, or admitted, would entitle him to recover, but the respondents deny the averment of this appellant, and put the same in issue, not in the technical form of making such an issue, but in substance, by declaring, "that they were in "the quiet and peaceable possession of the same until the said "Ladd with force and violence attempted to take possession "thereof;" and that he entered upon said real estate as a tres-

passer; that the agent of respondents, at the time, represented to appellant that the property belonged to respondents, and was in their possession. The question is not what was the remedy of respondents, nor what ought to be the decision of the court below upon a trial on the merits. If the appellant was in the quiet enjoyment of actual possession, and was forcibly ousted by the respondents, with the aid of illegal interference on the part of judicial officers, he ought to recover the same and hold it until ejected therefrom by due course of law; but if the averments of the answer be true, he was not in such possession, he was a naked intruder, interrupting the respondents in the peaceable possession of their premises, when he was forcibly expelled. As well might it be said that he who forcibly, and with violence, enters a room in the temporary absence of the tenant, can sustain an action for recovery, because he was forcibly ejected therefrom on the return of the tenant.

If the statements of the respondents then be true, the appellant would have no right to recover the possession, obtained through force and violence and by his own tortious acts; and the facts stated by respondents being inconsistent with the truth of the petition, the case is substantially at issue. It was unnecessary for the respondents to admit or deny that part of the complaint in relation to the illegal proceedings of the alcalde. Those proceedings should not have been set forth in the complaint, and should be rejected as surplusage, and if exceptions perform the office of demurrers, the court below should not only have overruled the exceptions in this case, but should have directed appellant to amend his complaint. If there were any rules of practice in this State regulating the forms of proceedings before courts of First Instance it would perhaps be proper to award a repleader; but by the acts of 28th of February, imperfections, errors and irregularities in pleadings are to be disregarded; and believing that in substance there is an issue before the court below upon the question of peaceable and quiet possession at the time mentioned in the complaint, I think the court below did not err in overruling the exceptions, and that the issue should then have been tried on its merits, not-

withstanding notice of appeal had been given, and that this court ought not to entertain jurisdiction; the decision of the court below being on a collateral question and not conclusive as to the true points in issue.

Loring, respondent, *vs.* Illsley, appellant.

It seems that, under the act of February 28th, 1850, this court has no appellate jurisdiction over judgments rendered by courts of First Instance, before the passage of that act, except *final* judgments.

What is a *final*, and what an *interlocutory* judgment or order, considered.

Judgment having been obtained against A., who was master and one-third owner of a certain bark, for the sum of $2000, in the court of First Instance, and his interest having been sold and purchased by B. *Held*, that a further judgment rendered in a subsequent proceeding, ordering that the *possession* of the bark should be delivered to B. was erroneous. *Held*, also, that such judgment is a *final* judgment, over which this court has appellate jurisdiction, under the act of February 28th, 1850.

Where process of a court, as an execution, commanding the sheriff to deliver possession of a chattel, has been *finally and completely executed*, the power of the sheriff under it, and the authority of the court to enforce it, cease: and a wrong doer, afterwards trespassing upon the person thus put in possession, cannot be deemed guilty of contempt for disobedience to the process of the court. *Per* Bennett, J.

The title acquired by a third person, in good faith, under a judgment of the court of First Instance, while such judgment is in force, is protected by sec. 6 of the act of February 28th, 1850, and is not impaired or affected by the reversal of the judgment by this court.

Whether courts of First Instance have admiralty jurisdiction in proceedings *in rem*: Query?

Where the master of a vessel was one-third owner, and all his right, title and interest in the vessel had been sold under execution against him; *held*, that the purchaser of his one-third interest was not entitled to supersede the master in the command of the vessel, nor deprive him of the possession thereof.

The transfer of a minority interest in a vessel by virtue of a sale under execution, does not confer upon the purchaser any more extensive control than the execution debtor himself enjoyed; and, as a general rule, the majority of owners can control not only the employment and destination of a vessel, but also the appointment of a person to take charge of her as master. It does not alter the case, that the debtor was the master of the vessel, for his right to the possession and command is not the subject of sale on execution.

This was an appeal from a judgment rendered by the court of First Instance for the district of San Francisco. The facts sufficiently appear in the opinion of the court. The cause was argued by

Gregory Yale, for the plaintiff, and

P. A. Morse, for the defendant.

By the Court, Bennett, J. On the 17th day of December last, Richard S. Slaughter, Francis H. Reynolds, and Nathaniel Dean filed their several bills of complaint before the judge of First Instance of the district of San Francisco to recover damages for certain grievances claimed to have been committed against them respectively, while passengers on board of the bark Ella Frances, on her passage from Panama to San Francisco. After setting forth the cause of action, each of the complaints alleged that Frederick Illsley was part owner and master of the bark, and prayed that he and the other owners, when made known, and the bark itself might be cited to answer unto the complaint, and condemned *in solido* to pay the damages respectively claimed, and that the bark might be sold to satisfy the same. Summonses were therefore issued in the several suits, commanding *Illsley*, the master, to appear and answer the complaints. He accordingly did appear by his attorneys, and put in a *several* plea of the general issue on his own behalf. There was no answer put in on the part of the bark, or of either of the other owners, no process served upon them, no publication of notice requiring them to appear, and *no appearance of record* on their part. The causes coming on for trial, they were, by consent of parties, all tried together before the same jury, who rendered a verdict in each suit in favor of the plaintiff. Judgments were rendered for each of the plaintiffs against the "bark Ella Frances," &c., and executions upon such judgments respectively issued against the "bark Ella Frances and Illsley, master," under which, according to the return of the sheriff, endorsed on the executions, the "bark Ella Frances" was sold to the plaintiff,

James L. Loring, who was put in possession of the vessel by the sheriff. Illsley thereupon dispossessed Loring, and has retained possession of the vessel to the present time.

On the 7th day of February last, Loring filed his complaint in the court of First Instance, setting forth his purchase under the executions, the delivery of possession to him, his dispossession by force and violence, and praying restitution. Illsley put in his answer to this complaint and insisted therein, that he was entitled to the possession of the bark as master, and the court, after several continuances, gave judgment against him, and required him to deliver possession to Loring; from which determination an appeal is taken to this court.

By the judgment of the court of First Instance, it is declared "that in the sale of the bark Ella Frances, under the order and "decree of this court and by the sheriff of this court, James L. "Loring the plaintiff in this proceeding purchased all the right, "title, and interest of Frederick Illsley the captain and defen- "dant in the proceeding in and to said bark Ella Frances," and that Illsley had and owned at the time of the sale, "one- "third part of said bark Ella Frances in his own right." It is also set forth in the judgment that Illsley, as appeared from the register, represented the vessel and the other part owners, and it is adjudged that, in the suits under which the sale took place, he made a defence for the other owners as well as for himself. The record then proceeds as follows:—"The court, therefore, "orders, adjudges and decrees, that from and after said sale, and "by virtue thereof, all the right, title, and interest of the said "Captain Frederick Illsley in and to said bark Ella Frances, her "tackle, apparel and rigging, *including his right* to hold the "possession, control and command of the same, passed to and be- "came the right of the said James L. Loring." The judgment further orders the sheriff to deliver possession and to summon to his assistance the power of the county for that purpose, unless before the 10th day of March, Illsley should pay to Loring the sum of two thousand dollars, the amount of the purchase money paid by the latter, with interest thereon, at the rate of five per cent. per month from the date of the sale, and also one

hundred and fifty dollars for the fees of Loring's attorney, together with the costs of this proceeding.

Under this state of facts it is claimed by the counsel for the appellant: First, that the proceedings under which the bark was sold, were in substance suits *in personam* against Illsley, and not *in rem* against the vessel, and that no sale could have been made of any interest in the bark beyond the interest of Illsley as part owner. Secondly, that the master of a vessel can be displaced only by the majority of the part owners in a direct action in admiralty for that purpose; and thirdly, that courts of First Instance have no admiralty jurisdiction. The converse of the last two propositions is insisted upon by the counsel for the respondent, and also that the original suits may be regarded as proceedings either in admiralty or at common law, and that in either view they are legal and should be sustained. It is also contended by the counsel for the respondent, that the determination of the court below is not a final judgment from which an appeal can be taken to this court within the provisions of the act of February 28, 1850, regulating appeals; and, secondly, that if it be such a final judgment, the title of Loring to the bark is protected upon the ground of his being a purchaser, in good faith, while the judgments under which he holds were in force.

It becomes necessary, in the first place, to dispose of the question, whether this court can entertain an appeal from such a determination of the court of First Instance as is presented in this case. The act of February 28th provides, that an appeal may be taken from any *final judgment* of a court of First Instance rendered since the first day of January, A. D. 1847; and if the decision of the court below be a *final judgment*, an appeal lies—otherwise, not. What, then, is the distinction between an order and a final judgment? The former is a decision made during the progress of the cause, either prior or subsequent to final judgment, settling some point of practice or some question collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution

the final judgment. The latter is the determination of the court upon the issue presented by the pleadings, which ascertains and fixes absolutely and finally the rights of the parties in the particular suit in relation to the subject matter in litigation, and puts an end to the suit. The appeal in the case at bar is from a decision pronounced upon the trial of an issue formed by a complaint filed for a specific purpose, and an answer on the part of the person complained against. The subject matter in dispute is the possession of the vessel—the issue tendered by the pleadings is, which party has the right to that possession—and the award of the court decides that issue definitively in favor of the plaintiff, and puts an end to the litigation. The mutual allegations of the parties are more nearly analogous to pleadings in original suits, than they are to papers upon which motions for interlocutory orders are made, and the decision of the court is in form, phraseology and effect a final judgment.

But further, after the sale under the executions, Loring was put into possession of the bark by the sheriff. The process of the court was thus finally and completely executed, and from that moment the power of the sheriff under it, and the authority of the court to enforce it, ceased. The sheriff was not, by virtue of the mandate of the executions, required to *keep* the purchaser in possession, nor could the court order fresh executions or other process to issue commanding him to that effect. Neither could the court deem the defendant in contempt for disobedience to its process, because, that, having been fully and completely executed and obeyed, had spent its force and was of no further effect. If Loring was afterwards dispossessed by Illsley without right, he is left to the same mode of redress, to which he would have been obliged to resort, in case he had been despoiled of his possession by any other wrong doer; that is, to an ordinary suit to procure restitution. The decision appealed from cannot, therefore, be regarded as an order made in the original suits, and if it is not a final judgment, within the meaning of the act of February 28th, it is no authorized legal proceeding of any description.

It is contended by the counsel for the respondent that Loring is a purchaser in good faith. The last clause of sec. 6 of the act above referred to, provides that no reversal of any judgment or order of the court of First Instance by the supreme court shall take away or impair rights acquired by third persons, in good faith, under such judgment, while it was in force. The judgments under which Loring claims were in full force at the time of the purchase by him, and any rights which he acquired thereby must be protected. But this in no manner alters the point in dispute, for the question recurs, what rights did he acquire—a title to the whole bark, or only to the minority interest of Illsley? And these questions involve the inquiry, whether the cases of Slaughter and others are to be regarded as suits in admiralty *in rem*, or proceedings *in personam* in the ordinary course of judicial investigation; if the former, then the whole bark must have been sold; if the latter, the interest of Illsley only can have been disposed of—for under proceedings in admiralty *in rem*, the interest of one part owner cannot be sold to satisfy a demand due from the vessel itself, whilst in suits *in personam* in courts other than admiralty courts, no man can be deprived of his property without first having been personally cited to appear and make his defence, unless by virtue of some positive statutory enactments.

It is difficult to say from an examination of the pleadings and other papers in the original suits, whether they were intended as suits in admiralty or as common law actions. We think it would be difficult to sustain them as admiralty proceedings in consequence of want of conformity to the practice in such cases, whether we are to be governed by the course of practice of the Mexican Republic or in the United States; and we are of opinion that the judgment from which this appeal has been taken furnishes sufficient reasons why we should regard those former suits as ordinary actions *in personam* against Illsley alone. That declares that Loring purchased the interest of Illsley, being one-third part of the bark, without any claim that he acquired a title to the interests of the other part owners; and although it alleges that he made a defence for them, yet it seems

that such defence was necessarily connected with his own, and which he could not well avoid without at the same time abandoning his own. We do see that neither of the other owners in any way appeared upon the record, or made any defence of record. Again, if the court below had deemed that anything more than Illsley's interest had been sold, it would scarcely have made an order requiring the payment of the $2000 and interest, as the condition of his being allowed to retain possession of the vessel. We are, therefore, of the opinion that the suits under the judgments in which the sale took place should be regarded as proceedings *in personam* against Illsley alone, and not *in rem* against the vessel—that only his rights have been affected thereby—and that his interest only was sold under the executions and purchased by Loring. If we are correct in this view of the case, it becomes unnecessary to pass upon the question, which was so elaborately argued at the bar, whether courts of First Instance have admiralty jurisdiction.

The question then arises, what was the extent of the rights acquired by Loring under his purchase of the interest of Illsley? Did he gain the right of the latter to hold possession of the vessel as master, superadded to his interest as part owner? We consider the question by no means unembarrassed with difficulties. No authorities were cited upon the argument bearing directly upon the point, or showing anything more than the general rights of owners and masters of vessels; and in our own researches through the limited number of books at our command we have not been able to find a solution of the case, and are thus left to deduce our conclusion from general principles.

On the one hand, we are met with the argument, that a sheriff under an execution must necessarily take possession of the personal property upon which he levies—that being authorized to seize the interest of one of several part owners in a chattel, he must take the sole possession of it, in order that it may be forthcoming at the day of sale—and that after the sale he may deliver it over to the purchaser; and, applying this doctrine to the present case, that the sheriff, having taken possession of the vessel, and retained it down to the time of sale, not only had

the right but was obliged to transfer that possession to Loring. On the other hand, we are reminded that a master of a ship is appointed by the majority of owners, and cannot be removed by the minority, and that this rule is equally applicable after the sale of a part interest under execution, as in case of a voluntary transfer.

The conduct and management of a ship are always entrusted to the master, whether he has or has not a partial property in it; and in either case he is the confidential servant or agent of the owners at large. (*Abbott on Shipping*, 123, 124, *London Ed.* 1844.) Personal trust and confidence are reposed in him by the owners on account of his known or supposed experience and skill, and as a general rule, the majority of owners can control not only the employment and destination of the ship, but also the appointment of the person to take charge of her as master. (*Id.* 98, 99, *and note "f" on page last cited.*) The voluntary transfer of a minority interest in a ship does not confer upon the purchaser any more extensive control than the vendor himself enjoyed; and it is difficult to see why a forced sale under execution should have any greater effect than a voluntary transfer. If a distinction be made, then in case of a sale under execution of a minority interest, however trifling it may be, power is given to the minority to usurp the legal right of the majority in appointing or discharging the master, and in controlling the management of the affairs of the vessel. In the case before the court, two-thirds of the bark are owned by citizens of the Atlantic states, who have entrusted her to the prudence and skill and experience of a master selected by them; and it is sought to deprive them of their legal control, and give it to the owner of but one-third. We think this ought not to be done. The fact of the person, whose interest has been sold under the executions, being also the master, can work no change in the principle. The master of a vessel, *as such*, has no interest in it, which can be the subject of levy and sale under execution. He is but a naked agent—and a naked agent, whether the subject matter of his agency be a ship or any other chattel, has no substantial interest in the property which

can be levied upon and sold; and although the interest of Illsley as part owner has passed to Loring, by virtue of the sale, his agency as master is in no way affected.

So much, therefore, of the judgment of the court below as determines that the right of Illsley to hold the possession, control and command of the bark *Ella Frances* passed to and became the right of Loring, and requiring the former to yield up and deliver possession of the same to the latter, must be reversed. This leaves Loring the owner of. the interest of Illsley, and entitles him to compel an account of the profits which the bark may make, in the manner prescribed by law for compelling accounts between joint owners of vessels.

An order will be entered accordingly.

GONZALES *vs.* HUNTLEY & FORSYTH.

On an appeal from a judgment of a court of First Instance, where the record contained none of the proceedings of the court below, except the pleadings and judgment, and these were sufficient, no portion of the evidence being returned; *held*, that this court would presume, nothing appearing in any way to the contrary, that the proceedings were regular, and that sufficient evidence was adduced at the trial to warrant the judgment.

THIS was an appeal from the court of First Instance of the district of San Joaquin. The pleadings and judgment returned were regular and sufficient on their face, and neither the evidence taken on the trial, nor any part of the other proceedings had in the cause, was returned, and the case was presented to the court simply on the pleadings and judgment. The judgment was in favor of the plaintiff, and the defendants appealed.

P. A. Morse, for defendants, *ex parte*.

By the Court, HASTINGS, Ch. J. The proceedings before the court of First Instance appear to have been substantially regular, and if there was error in the court below, it does

not appear of record. It must be presumed that the court had sufficient evidence to authorize the judgment which it rendered, otherwise few judgments of courts of inferior jurisdiction could be sustained. It is true, as argued by counsel for appellants, that the statute of 28th of February 1850, authorizes this court to remand the cause for a new trial or for a more perfect record, but no court ought to award a new trial unless for good cause shown, and we do not think that a cause should be remanded for new trial in the court below, for the reason alone that "*no tangible point is presented for determination*," in the language of the statute.

If the return be incorrect, the appellants can have writs of certiorari and mandamus, and the record can thus be perfected.

The statute of 28th of February was intended to facilitate appeals to this court, and in its effect repeals all former laws in force in this country regulating appeals. It is strictly a *remedial* statute, enlarging the right of appeal, and in its effect removing all obstacles to the prosecution of appeals from the courts therein mentioned. If its provisions were retro-active in their effect, impairing vested rights, they would be repugnant to the principles of the common and civil law, and void. There appearing nothing of record exhibiting error in the proceedings of the court below, the judgment is affirmed.

PAYNE *vs.* THE PACIFIC MAIL STEAMSHIP COMPANY.

This court has jurisdiction, on appeal, of an *order* of the court of First Instance, affecting the merits in a case, where the appeal was brought *before* the passage of the act of Feb. 28th, 1850.

The plaintiff recovered judgment against the defendants for $1000, that sum being the amount of damages awarded by a jury, before whom the cause was tried. On motion for a new trial, the judge of First Instance ordered that the judgment should be set aside, and a new trial granted, unless the plaintiff would consent to remit $400 of the judgment which had been rendered in his favor. On appeal from this order, *held*, that this court had jurisdiction of the appeal, and the order was reversed and set aside.

Whether a court of First Instance has power to set aside, vacate, or modify its own judgment, when once finally entered: Query?

The rules by which courts are governed in setting aside the verdicts of juries on the ground of excessiveness of damages, considered. *Per* Hastings, Ch. J.

The order appealed from is not a matter resting in the discretion of the court, and is reviewable on appeal.

The action was brought to recover damages for neglecting to supply the plaintiff with wholesome food on the passage from Panama to the port of San Francisco, and for the loss of the plaintiff's baggage. The value of the baggage was estimated by witnesses to have been about $400, in the city of New York, and from $1200 to $1600 in San Francisco. The defendants were a company engaged in the transportation of passengers from Panama to San Francisco, and from San Francisco to Panama. Considerable evidence was given on the trial, but no point of law was made, and the whole matter was a question for the determination of the jury upon the evidence. The jury having found a verdict for $1000 in favor of the plaintiff, the court of First Instance, after having rendered judgment on the verdict, made an order, on motion of the defendants, setting aside the judgment and verdict, unless the plaintiff would consent to remit $400. From this order the appeal was taken. The case differs from that of *Loring* v. *Illsley* (*ante*, *p*. 24,) in this respect, that here the order was made and the appeal taken *before* the passage of the act of February 28th, 1850, whereas, in the case referred to, the judgment was rendered *before*, but the appeal was not taken until *after* the passage of that Act.

Mr. Groat, for the plaintiff, and

Hall McAllister, for the defendant.

By the Court, Hastings, Ch. J. Two causes are assigned for the dismissal of the appeal. 1st. That an appeal will not lie from the decision of the court below, setting aside the verdict of the jury and granting a new trial. 2d. The decision appealed

from was the exercise of a discretion of the court which an appellate court ought not to interfere with.

That appeals from any judgment, order, or determination of the court of First Instance, taken before the passage of the statute of February 28th, 1850, and from any such judgment, order, or determination, made or rendered after the passage of said Act, will lie to this court, is clear from the third and sixth sections of said Act. This appeal was taken on the 8th day of February, A.D. 1850, and was clearly within the provisions of said third section.

The sixth section regulating the mode of effecting an appeal, among other things, provides, "That appeals may be taken "from any final judgment of any court of First Instance, ren-"dered since the first day of January, A. D. 1847, or from any "judgment or order of said court which may be rendered any "time hereafter."

The case of *Loring* v. *Illsley*, decided by this court, falls within the provisions of said sixth section, the judgment having been rendered before, and the appeal taken, after the passage of the Act. A writ of error will not usually lie for the purpose of reviewing any order or judgment of any inferior court founded upon the sound discretion of the court, but this court possesses more power than ordinarily pertains to a court of errors, to wit: it is styled an appellate court, and is authorized by law to entertain appeals from interlocutory orders, decrees, judgments, and determinations of all the courts of this state, in the manner limited and prescribed by law. It is a court of the last resort, except in the few instances in which appeals will lie from its decisions to the supreme court of the United States, which right is suspended until the admission of the state into the Union. In the case of *Campbell* v. *Stokes*, 2 *Wendell*, 145, Chancellor Walworth, in delivering the unanimous opinion of the court of errors, says, "There is a manifest difference to be "observed between the proceedings on writs of error in this "court and the proceedings of the supreme court on writs of "error to inferior tribunals," from which it may be inferred that courts apparently possessing the same prerogatives and

jurisdiction, may differ widely in the extent of their power. Entertaining these views, we think the motion to dismiss the appeal should be overruled. The question whether the court below erred in setting aside the verdict and ordering a new trial, unless the plaintiffs should enter a *remittitur* of $400, still remains to be settled. Although no cause appears of record for setting the verdict aside, it is to bé presumed that the cause was excessive damages. It is admitted that the record contains all of the testimony. Courts with great reluctance ever interfere with the finding of a jury in an action for unliquidated damages for reason that the damages are excessive, and a court ought never to set aside a verdict for such a cause, unless, beyond doubt, the verdict be unjust and oppressive, obtained through some undue advantage, mistake, or in violation of law, as upon questions so peculiarly pertaining to the powers and investigation of the jury, it ought to be presumed that the verdict of the jury is correct. In this case the action was instituted for recovery of damages for neglecting and refusing to supply the appellant with wholesome food, while a passenger on the steamer *Panama*, from Panama to the port of San Francisco, for loss of baggage, estimated by witnesses to be of the value of $400, in the city of New York, and of $1200, or $1600, in this country, and for consequential damages arising therefrom.

It seems to be extremely questionable whether courts of First Instance possess the power of granting new trials, as practiced in courts of common law. That such courts could set aside any interlocutory order or sentence, there seems to be no doubt, but a definitive sentence once pronounced could not be altered except by the next superior court in grade on appeal. (*Escriche, Sala's edition*, 284–5.)

It appears to be repugnant to the policy of the civil law system of practice to permit the courts to set aside or revise their judgments once rendered, so jealous is that system of the motives which might induce the judges to review their own sentences after they had once been declared. The court in this case submitted the assessment of damages to a jury, who returned a verdict for the plaintiff for the sum of $1000, a sum far less

than the amount claimed. No violation of law, or any established rules of practice, or mistake, or fraudulent acts on the part of the plaintiff, are alleged as a cause for interfering with this verdict. The right of trial by jury in civil as well as criminal cases, being secured by the Bill of Rights, and believing, as we do, that it is the duty of this court to remove every obstacle in the way of a free exercise of this right, and that it should not be interfered with on the part of the courts, except for the reasons above alluded to, and that in the end, however just it may have appeared to the court below to set aside this verdict, great abuse, if not the destruction of this right, would ensue, we are of the opinion that the order of the court of First Instance, granting a new trial, should be reversed. So much, therefore, of the proceedings of the court below, which provide for a new trial on the issue joined, is reversed, and said court is ordered to enter up judgment upon the verdict.

LAWRENCE *vs.* COLLIER, and others.

A verdict of a jury will not be set aside, on the ground that one of the jurors "knew and was aware of the circumstances connected with the affair," the subject matter of the suit, where no objection to him was made until after the verdict was rendered, and it not appearing that he had formed or expressed an opinion before the trial, or was in any way biased in favor of the plaintiff.

THIS was an action brought in the court of First Instance of San Francisco, against James Collier and his two sons Edwin D. Collier and John A. Collier, to recover damages for an assault and battery claimed to have been committed by them on the plaintiff, while crossing the country from Santa Fé to California. Much conflicting evidence was given at the trial, but no questions of law were raised. The cause was tried before a jury, who found a verdict for the plaintiff in the sum of $1675, upon which judgment was rendered by the court. The defendants made a motion for a new trial in the court of First Instance,

and the court ordered that "the verdict should be set aside and a new trial granted, unless the plaintiff would consent that the verdict be reduced to five hundred dollars." The plaintiff refused to consent, but appealed from the order to this court.

E. C. Marshall, for the plaintiff.

Wilson Shannon, for the defendants.

By the Court, HASTINGS, Ch. J. This was an action for damages for an assault and battery. The jury rendered a verdict in favor of appellant for $1675, and a judgment having been duly rendered thereon, the defendants moved the court to set aside the verdict, and grant a new trial upon the affidavit of one William Brisbane, to the effect that one of the jurors, James Swartwout, "knew and was aware of the circumstances connected with that affair," the alleged assault and battery, prior to being summoned as a juror. It is unnecessary for this court to decide that such knowledge would not disqualify a juror, and such seems to have been the opinion of the court below, as is apparent from the order of the judge as follows:—"Whereupon, after hearing *coun-*" *sel* on both sides, his honor the judge gave and declared his "decision that said verdict should be set aside, and a new trial "granted, unless the plaintiff would consent that the verdict be "reduced to five hundred dollars." From this decision the appellant appeals to this court. For the reasons stated in the case of *Payne* v. *The Pacific Mail Steamship Company*, decided at the present term of this court, the above order of the court of First Instance is reversed, and the court below is ordered to enter judgment upon the verdict.

PAYNE *vs.* JACOBS, *et al.*

The finding of a jury, or of a court passing on the facts in place of a jury, and deciding upon the weight of testimony, will not be reviewed by this court, unless such finding be impeached for fraud, misconduct, or mistake, or other improper influences.

The rule laid down in *Payne* v. *The Pacific Mail Steamship Company*, (*ante*, p. 33,) approved.

APPEAL from the court of First Instance of the district of San Francisco. The facts are fully stated in the opinion of the court. The case was argued by

Alexander Campbell, for the plaintiff.

Mr. Stafford, for the defendants.

By the Court, HASTINGS, Ch. J. On the 5th day of December, A.D. 1849, the following entry appears on the records of the court below: "Now at this day the parties being ready for trial, the court "sitting as a jury hears the proofs, and finds for the plaintiff in "the sum of $1083 95, together with the costs and charges in "this behalf expended. It is, therefore, considered by the "court that the said plaintiff recover of the said defendants "the said sum of one thousand and eighty-three dollars, and "$\frac{95}{100}$, together with the costs and charges in this behalf ex-"pended; and that the defendants be required to prove by "their books the value of the socks, on next Saturday, at 6 "P.M., at which time the court will hear further testimony in "the case."

And again on the 6th appears the following entry :—"Now "at this day, upon a re-hearing of this case, the court sets aside "the previous judgment, and finds for the plaintiff in the sum "of $2789," and enters judgment accordingly.

On the 8th day of the same month, the defendant moves the

court to set aside the verdict and judgment for the following reasons:—1st. Because the verdict is against the law. 2d. Because the verdict is against the evidence, and for other reasons of similar import. Which motion the court overruled, and an appeal is taken therefrom to this court. If it appeared from the evidence spread upon the record, that the verdict was against the law, this court would not hesitate to reverse the order of the court below; and if it clearly appeared that by any mistake, unlawful interference of either party, or any undue influence whatever, an erroneous verdict had been rendered, a new trial would be ordered. It appears that the plaintiff sold to the defendants three invoices of goods, amounting in the whole to the sum of $10,400, one of which invoices consisted of 977 dozens of woolen socks, and 50 pairs of blankets. In the bill of sale it is stated that some of the bales of socks were damaged, but how many or to what extent was unknown, and the parties agreed to refer the articles damaged to J. V. Plume, and that if his decision should not be satisfactory to both parties, the purchasers should take the goods which were not damaged at the *pro rata* price at which the whole was bought, and the vendees should return the portion that should be found damaged. Under this agreement all the goods appear to have been delivered to and received by the defendants. Mr. Plume made an estimate of the amount of damage, and came to the conclusion that it was $3000, but the defendants, as they had a right to do under the agreement, refused to abide by his decision. From this it follows that the plaintiff was entitled to a return of that portion of the goods which was found to have been damaged; and it appears from the testimony of Mr. Hungerford, that the defendants, upon demand made, refused to return the damaged articles. They were therefore liable for their value. The question then submitted to the court as a jury, was the value of the damaged goods which the defendants refused to return. This was purely a question for a jury to pass upon, and unless for mistake, fraud, or misconduct of the jury, or other improper influences, the finding of the court should not be disturbed. Here was a violation on the part of the defendants of the stipulations

of the contract; and should this court listen to arguments of counsel to show that the finding of the court was contrary to the weight of testimony, we should establish a precedent, which, if followed, would result in converting this bench into a jury-box. In the case of *Payne* v. *the Pacific Mail Steamship Company*, we decided that the courts below cannot lawfully interfere with the finding of a jury in such cases, and the court will not attempt to exercise a power over the verdicts of juries which it has denied to the court in which the verdict may have been rendered. It is not to be inferred from this that a court may not set aside a verdict which is clearly contrary to evidence, nor that this court will refuse to examine the evidence embodied in the record, to ascertain whether an outrage upon the rights of one of the parties has been committed by the jury; but we mean to assert the doctrine, that the finding of a jury, or a court acting as such, upon the weight of testimony, will not be reviewed by this court, unless such finding be impeached for some one of the causes above alluded to. In this case the question as to the amount of damage to the goods had, previous to its having been brought before the court of First Instance, been presented to three different sets of arbitrators, who came to as many diverse conclusions. The court below, after setting aside one judgment previously rendered, changed not only the amount of the prior judgment, but differed widely from the arbitrators; and it may not be improper here to remark, that the judges of this court are farther apart in their estimate of damages than the arbitrators and court of First Instance; and should we deem it proper to sit as a jury, weigh the testimony, and be able to agree as to the amount of damages, the conclusion to which we should come would probably be deemed by the parties no nearer right, than the opinion of those to whom they have heretofore appealed. We shall not therefore disturb the judgment of the court below, believing that we cannot do so without a violation of law, and the well known rules which regulate the proceedings of courts having this jurisdiction. The judgment of the court below is affirmed.

PALMER *vs.* BROWN.

The court will not reverse a judgment where nothing is returned on appeal except the pleadings and judgment of the court below, and these are regular and sufficient. The case of *Gonzales* v. *Huntley & Forsyth*, (*ante*, *p.* 32,) approved.

APPEAL from a judgment of the court of First Instance of the district of San Francisco. The facts of the case, so far as they are important, are the same as the facts in the case of *Gonzales* v. *Huntley & Forsyth*, (*ante*, *p.* 32.) The cause was argued in this court by

John Satterlee, for the plaintiff.

J. B. Hart, for the defendant.

By the Court. This case is not distinguishable from *Gonzales* v. *Huntley & Forsyth.* The judgment is, therefore, affirmed.

FROTHINGHAM *et al. vs.* JENKINS *et al.*

The master of a ship has a lien on the cargo for the freight, and is not bound to deliver to a consignee any part of the goods specified in a bill of lading, until the whole freight is paid: and an offer to give good security for the payment of the freight is not sufficient to compel a delivery by the master.

Delivery of goods by the master, and payment of freight by the owner are concurrent acts, and neither party is bound to perform his part of the shipping contract, unless the other is ready to perform the correlative act.

Delivery of part of the goods mentioned in *one* bill of lading to the consignee, does not defeat a lien on the remainder for the whole freight unpaid.

A., a merchant in Boston, shipped by *one* bill of lading, certain merchandise to San Francisco, consigned to B. who was the mere agent of A. the owner. On arrival, part of the merchandise was delivered, and part of the freight paid; but the agent being unable to raise funds to pay the whole freight, offered to give good security

for the payment thereof in case the master would make the delivery, which offer the master refused to accept. *Held*, that the master had a lien on all the goods mentioned in the same bill of lading for the entire freight, that part delivery was no waiver of his lien on the remainder of the goods for the unpaid balance of freight, and that an offer to give good security for payment of the freight could not divest the master's lien.

Appeal from the court of First Instance of the district of San Francisco. The facts are fully stated in the opinion of the court.

J. B. Hart, for plaintiffs.

Hall McAllister, for defendants.

By the Court, Bennett, J. The plaintiffs shipped at Boston under *one* bill of lading a cargo of merchandise, owned by them, for San Francisco, under consignment to H. A. Breed, he or they paying freight thereon, the amount of which was $17,601,35. According to the contract, as appeared by the bill of lading, the goods were to be delivered along side of the ship within reach of her tackles, and were to be received within twenty days after arrival—if not received within that time, the master was to have the right of selling them. The items of freight estimated on each of the articles shipped, and making in the aggregate the gross sum above stated, were set down at the time of the shipment, in a paper attached to the bill of lading. A question was made at the trial whether $8000 of the freight was paid before the sailing of the ship, but there is no proof of such payment. Soon after the arrival at San Francisco, the consignee, on behalf of the owners of the cargo, for whom he acted as agent, paid $6000 on the freight, and received a small portion of the goods, but was unable to raise funds to pay the balance of the freight. He, thereupon, requested a delivery of certain specific articles, which would command a ready sale, in order that he might take them into the market and dispose of them, and he offered to give good security to the master that the money received on the sale of such portions of the cargo as might be delivered to him,

should be applied towards the extinguishment of the freight. The master declined this offer, and also refused to deliver any more of the goods until the freight on the whole was paid. This suit was then brought, an injunction issued restraining the master from selling the goods, a trial had, and from the judgment of the court below dissolving the injunction and dismissing the suit, the plaintiffs have appealed.

We think that the judgment of the court below must be affirmed. Here is a variety of merchandise shipped to one consignee, all to be delivered at the same port, for a given amount of freight; an inability on the part of the owners to pay that freight, and suit brought by them to attain some end, of which they themselves seem to have had but an indistinct and indefinite notion. The master had a lien upon the goods for the freight agreed to be paid thereon, and was not bound to part with any of them until the whole freight was paid. (3 *Kent's Comm.* 220, 222; *Angell on Com. Carr.* 368; *Abbott on Ship.* 365, *5th Am. Ed.*) Offering to give good security, or giving good security, is not payment. Delivery of a part of the goods shipped to one consignee, does not defeat a lien upon the remainder for the whole freight. (*Cross on Lien*, 290, *mar. pag.; Angell on Com. Carr.* 360; *Abbott on Ship.* 461.) Part delivery, therefore, in this case, did not affect the lien. The delivery of goods and the payment of freight are concurrent acts, and neither party is obliged to perform his part of the contract, without the other being ready to perform the correlative act. (*Angell on Com. Carr.* 368.) The defendants could not require payment without a readiness to deliver, and the plaintiffs could not demand delivery without a readiness to pay. The plaintiffs were not ready to pay, and consequently they were not in a situation to require delivery, or to bring suit for a refusal to deliver.

We should be disposed to afford relief, if we could do it without violating settled rules of law. The defendants appear to have pursued a legal, but at the same time an unconscionable course. They have exacted a strict compliance with their contract, and we cannot compel them to waive their rights, what-

ever opinion we may entertain of the fairness of their conduct. Whether the plaintiffs would have any remedy in case the defendants should sell the goods, and if so, what remedy, is not for us now to say.

Judgment affirmed.

GUNTER *vs.* SANCHEZ *et al.*

The submission of a cause pending in the court of First Instance to referees, to hear and determine the same, is not to be considered as an arbitration by which the cause will be discontinued.

The submission of a cause in court to arbitration, operates as a discontinuance of the suit.

The ordinary mode of enforcing an award is by action; and *it seems* where no statute exists authorizing the court to enter judgment on an award upon motion, that the court has no right to proceed in that way. And a consent to submit a matter to arbitration, does not imply a consent that the party in whose favor the award is made, may enter judgment upon it in court as a matter of course.

The practice of the court of First Instance, sanctioned by custom and approved by the profession, to refer causes to referees to hear and decide thereon, sustained. By such reference the suit is not discontinued.

It is not necessary to make a motion in the court of First Instance to set aside the report of referees, before a party can appeal to this court. HASTINGS, Ch. J. dissenting.

The decision of referees upon a question of fact will be regarded on appeal as conclusive as the verdict of a jury, and will not be interfered with.

Gold dust is not *cash*, within the meaning of a contract calling for the payment of *cash*.

A. purchased of B. a cargo of lumber for $38,000, one half of the purchase money to be paid in *cash*, and one-half in bills at 60 days. The bills were given, and A. offered to pay the balance of the purchase money in gold dust, at $16 the ounce, which B. refused to receive at a higher rate than $15,50 per ounce. A. thereupon paid the whole amount due in gold dust at the latter price, and B. accepted it at that rate. In an action by A. to recover damages for the non-delivery of the lumber within a reasonable time, and also the difference between the gold dust at $15,50 per ounce, and $16 per ounce; *held*, that the portion of the judgment of the court below allowing this difference as damages, should be reversed, and that the rest of the judgment, being for damages sustained by reason of the non-delivery of the lumber, should be affirmed.

It is no answer to the action for non-delivery of the lumber, that the plaintiff re-sold it soon after the purchase; it appearing that the purchaser from the plaintiff had a claim against him for non-delivery.

APPEAL from the court of First Instance of the district of San Francisco. All material facts are stated in the opinion of the court.

Gregory Yale, for plaintiff.

Alexander Wells, for defendant.

By the Court, BENNETT, J. On the 15th day of October last, the defendants sold to the plaintiff a cargo of lumber on board the ship *Almendralina*, lying in the harbor of San Francisco, for the gross sum of $38,000, payable one half in cash, and the other half in good bills at 60 days. The lumber was, by the contract, to be delivered on shore, but no time was fixed for its delivery. Very soon after the purchase the plaintiff sold the whole cargo to Messrs. Palmer, Cooke & Co. Previous to the delivery, the plaintiff paid the full contract price, $19,000 in gold dust, at $15,50 per ounce, and $19,000 in bills at 60 days. The plaintiff claimed, at the time of the payment, that the defendants ought to receive the gold dust at $16 per ounce, but the defendants refused to take it for more than $15,50, and it was paid to them at that rate, and accepted by them under protest. The lumber was not all delivered until in the early part of December; and this action was brought in the court of First Instance to recover damages for the delay in delivering it, and also to recover fifty cents on every ounce of gold dust paid, so as to make it equivalent to $16 per ounce, which was claimed to have been its market value. The cause was referred by the consent of parties to three referees, who, after hearing the proofs and allegations, reported that the refusal of the defendants to receive gold dust at more than $15,50 per ounce was an unreasonable exaction to the amount of fifty cents per ounce, and that the plaintiff had sustained damage thereby to the amount of $989,29, being the principal of fifty cents on the ounce and

ten per cent. per month interest. They also found that the lumber was not delivered within a reasonable time, and assessed the damages sustained by reason thereof at $4000. On the coming in of the report, judgment was rendered in the court of First Instance for $4989,29, the amount reported by the referees. No motion was made in the court below to set aside the report of the referees, but an appeal was taken directly to this court.

It was urged on the argument that the appeal could not be sustained, because the reference of the cause amounted to a submission to arbitration, and because no motion had been made in the court below to set aside the award of the arbitrators. These points have been decided at this term of the court, and we see no reason to doubt the propriety of the decision. If the reference of the cause was a submission to arbitration, the suit ceased to be pending in court, for the submission of a cause to arbitration operates as a discontinuance. (18 *Johns. Rep.* 22; 13 *Wend.* 293.) This we understand to be the common law doctrine. In England, it is only by virtue of the *statutes* 9 *and* 10, *Will. III. c.* 15, and 3 *and* 4 *Will. IV. c.* 42, that *judgment* may be entered upon the award of arbitrators, and enforced as a *judgment* of the court. Previous to these statutes the method of enforcing an award was by action, (1 *Chitty Pl.* 114, 116, 124,) except in those cases where the submission was made a rule of court, and enforced by attachment, as for a contempt, (*Kyd on Awards*, 21,) an innovation introduced by the English courts, but not sanctioned by American practice. The rule of enforcing an award by action prevails generally in the United States, except where otherwise provided by statute. In many, if not all of the states, the statutes above cited have been, in substance, re-enacted, but here we have no statute upon the subject. It follows that if the reference of this cause was a submission to arbitration, the suit was discontinued; and the judgment was consequently rendered without any hearing, without trial, without evidence, and with no suit pending in court between the parties. If this be so, the whole judgment should be reversed.

It was said that judgment may be entered upon an award by

consent of parties. A judgment may be entered by confession for the amount specified in an award in the same way that it may for the sum mentioned in a bond, note, or other instrument; but that is a judgment by confession. There has been in this case no consent of the defendants to the entering of the judgment for the amount reported by the referees. Their consent was given to the reference of the cause, and from that fact it is sought to infer their consent to the judgment. A confession of judgment upon a promissory note might, with the same propriety, be implied from the fact of consent to the making of the note. The judgment appealed from has been rendered, not upon the confession of the defendants, but as the legal result consequent upon the finding of the referees, and wholly independent of the consent of the defendants.

If the proceeding is to be treated as a reference, then the suit was not discontinued, but remained still pending in court. The referees acted as a substitute for a jury, and judgment was properly rendered upon their report the same as upon the verdict of a jury. It is true that a reference is a statutory proceeding, and that there is no statute upon the subject in this state; but, in the anomalous condition of things heretofore existing in California, it has been the practice sanctioned by custom and approved by the profession, to refer causes in the manner above-mentioned. In this case the proceeding was treated by the court below, by the parties, and by the referees, as an ordinary reference, and we think the position now taken for the first time, that it was an arbitration, ought not to be sustained. According to strict practice, a motion in the court below to set aside the report of referees is necessary, before a cause can be taken to an appellate court. But the failure to make such a motion is, like the other matters above noticed, but a defect, error, or imperfection, not affecting the merits of the case, and which we are authorized to overlook by the 26th section of the statute of February 28th, 1850. Besides, the uniform practice of the court of First Instance is to enter judgment on a report of referees, the same as on the verdict of a jury.

That portion of the judgment of the court below, which allows $989,29 for the difference in value of the gold dust, should be reversed. By the contract the lumber was to be paid for in cash, and gold dust is not cash. The defendants, however, could receive it at such price as they chose in lieu of cash, the same as they might accept any other article of merchandise instead of cash. They did receive it at $15,50 per ounce —the plaintiff paid it at that valuation—and though he paid it, as he says, under protest, his protest was a nullity. If gold dust was, in truth, at $16 the ounce, equivalent to cash, why did he not exchange it at that rate for cash, and make his payment in that about which there could be no question? Gold dust is constantly fluctuating in its market value—it is an article of traffic like merchandise, and a payment in it is a payment for just so much as the parties agree, and for no more.

The judgment in other respects cannot be disturbed. Two questions of fact were submitted to the referees—one, whether the lumber was delivered within a reasonable time, and the other, what amount of damage the plaintiff had sustained, in case it was not so delivered. There was a variety of conflicting evidence upon both of these questions; and no rule of law having been violated, the finding of the referees, like the verdict of a jury, ought to be final.

The objection is not well founded, that the lumber having been sold by the plaintiff, he could not have sustained damage by reason of its non-delivery within the proper time. The defendants are liable upon their contract to the plaintiff, and the plaintiff may be liable upon his, to Palmer, Cooke & Co. The latter can maintain no action against the defendants, for there exists no privity of contract between them; and the fact that Palmer, Cooke & Co. do not intend to sue the plaintiff, is not equivalent to a release of their claim upon him.

The judgment of the court below must be modified in accordance with the views above expressed.

Hastings, Ch. J. It is admitted that strict practice requires a motion to be made to set aside the report of referees before

the cause can be taken to an appellate court; but this practice is held to be a mere "technicality, defect, error, or imperfection," not affecting the merits of the case, which this court is authorized to overlook by the 26th sec. of the statute of 28th February, A. D. 1850.

In this I differ widely from the majority of this court. The practice requiring such a motion I believe prevails in all courts, both of England and America, and has never been waived before, and authorities need not be cited to show the necessity of such a motion. The 26th sec. of the statute referred to is in substance the law of most of the United States, and yet no court I think has ever held in those states that such a statute cures a defect of the kind.

It seems to be important that such practice should be required in all cases of appeals, for the reason that great injustice may be done to the court below, by giving it no opportunity of correcting its own proceedings.

It may well be asked, from what does the appellant appeal? Not, surely, from the decision of the court, refusing to set aside the report, because the court was never asked to make a decision upon the correctness or injustice of the report; and the appellant, by making no such motion, nor in any manner objecting to judgment upon the same, acquiesced therein; and it seems clear that still greater injustice is done to the party in whose favor the report is made, by causing him to incur the costs, expenses, and delays occasioned by an appeal to this court, when the court below would have afforded the relief sought by appeal, if a motion had been made. I therefore think the judgment of the court below should be affirmed, and no deduction made whatever.

Cole *vs.* Swanston *et al.*

On a sale of chattels, where no time of payment and no time for delivery are agreed upon, delivery and payment are concurrent acts; and neither party can maintain an action for non-performance, without showing a readiness and willingness to perform on his part.

Upon part delivery of goods, and an inability on the part of the vendor to deliver the whole quantity sold, he is, nevertheless, entitled to recover the stipulated price of the quantity actually delivered, deducting therefrom the damages sustained by the purchaser on account of the non-delivery of the whole.

Damages which do not legally result from the breach of the contract, cannot be recovered, unless they are specially claimed and set forth in the pleading; thus, damages sustained by a vendee of goods by reason of his inability to comply with a contract made by him with a third person, do not legally result from a breach of the contract of his vendor to deliver the goods to him, and, in an action by his vendor against him, cannot be recouped from the plaintiff's claim, unless such damages are specially alleged and set forth in the answer.

Where a judgment was affirmed in part, and reversed in part, the respondent was allowed his costs in the court below, but was required to pay the costs of the appeal.

Appeal from the court of First Instance of the district of San Francisco. The plaintiff, through his agent M. Dore, sold to the defendants on the 21st day of December, 1849, fifty thousand three hundred and twenty-five feet of lumber, then being, or supposed to be, on board of a ship in the harbor of San Francisco. The contract was in the form of a sale note, of which the following is a copy :—

"Sold Messrs. Swanston & Taylor, 50,325 feet lumber, *ex* Duchess Clarence, for account Captain Cole, @ $150 per M.
"21st Dec. 1849. M. Dore."

A portion of the lumber, amounting to 12,958 ft. was delivered to the defendants, and the balance of the cargo, being only 17,649 ft., was sold by Captain Cole, on account, as is claimed, of the purchasers, at the price of $760,72. That was the only lumber which Captain Cole owned, and the whole quantity on board the *Duchess Clarence;* and at the time the sale was made

to the defendants, the plaintiff, instead of having lumber to dispose of to the amount of 50,325 ft., the quantity called for by the sale note, he had only 30,607 ft.

No time or place was agreed upon for the delivery of the lumber at the time the sale note was made, although the course of conduct of both parties showed clearly that it was in their contemplation, that the plaintiff should deliver the lumber to the defendants in lighters at the side of the vessel. The quantity which was received by the defendants, was delivered in this manner.

The evidence shows that the defendants, on several occasions after the delivery of the 12,958 ft., sent lighters out to the vessel for portions of the balance, but were unable to procure any more. Several letters passed between the parties, in which the plaintiff, on his side, complained that the defendants did not remove the lumber, and the defendants, on their part, that they were desirous of receiving it, and had sent for it several times. but were unable to get it. Matters continued in this situation until the 14th day of January, 1850, when the defendants addressed a note to the plaintiff, in which they say, that in consequence of the delay and expense incurred in delivering the lumber, they should not receive any more, and that they should hold the plaintiff responsible for the expenses incurred by the non-delivery, and also for the damages which might be recovered against them in two actions about to be brought against them by purchasers of portions of the lumber from them, as also for their profits on such re-sales.

On the 21st day of January the plaintiff addressed a note to the defendants, in which he gave them notice, that unless they removed the lumber within two days, he should proceed to sell the same at public auction, and should hold them responsible for all loss, damage, and expense, which he should sustain in consequence of their default in carrying out their contract of purchase. This letter was answered by the defendants the next day. In their answer they sent an account of the damages which they claimed to have sustained by reason of the non-fulfilment of the contract on the part of the plaintiff, and notified

him that an action had been brought against them for non-delivery of a portion of the lumber by a purchaser to whom they had sold, and that they should hold the plaintiff responsible for any damages which should be recovered against them.

This action was then brought to recover for the lumber actually delivered, at the rate of $150 per thousand feet, and also for the difference between the nett proceeds of that portion sold by the plaintiff at auction, and the contract price of $150 per thousand feet.

The defendants, in their answer, admitted that they had received 12,958 feet of lumber from the plaintiff, but insisted that they were entitled to recoupe from the contract price of the quantity delivered such expenses as they had sustained by sending lighters to obtain the balance of the lumber, together with such " other damages" as they had sustained by reason of the non-delivery of the whole quantity of lumber mentioned in the sale note.

The cause was referred by the court; and the referee reported in favor of the plaintiff for the 50,325 feet, at $150 per thousand, after deducting $650,05, being the amount of nett proceeds of that portion which had been sold by the plaintiff at auction.

There was no testimony whatever before the referee to show that the plaintiff ever had at his disposal, either as owner or otherwise, on board of the *Duchess Clarence*, or elsewhere, a quantity of lumber anywhere near 50,325 feet. On the contrary, it was clear that he never had more than 30,607 feet, and it was not claimed on the argument in this court that he had a larger quantity.

Judgment was entered by the court of First Instance, in accordance with the report of the referee, and the defendants appealed.

John W. Dwinelle, for the plaintiff.

Edward Norton, for the defendants.

By the Court, Bennett, J. The plaintiff sold to the defen-

dants 50,325 feet of lumber, being on board of his ship in the harbor of San Francisco, at the rate of $150 per thousand. The sale note specifies no time or place of delivery. Only a small part of the lumber was delivered, and this suit was brought to recover the price of the whole.

The delivery of the lumber, and the payment of the purchase money are by the contract concurrent acts. Neither party can maintain an action against the other for non-performance, without showing a readiness and willingness to perform on his part. (1 *Chitty Gen. Pr.* 492; *Story on Con.* § 845.) The plaintiff does not prove that he was ready to deliver the quantity of lumber sold; on the contrary, he had, at no time after the sale, the quantity which the contract required him to deliver. Not being ready to perform the contract himself, he cannot complain that the defendants were unable or unwilling to perform on their part. He is, however, entitled to recover the stipulated price for the quantity actually delivered, deducting therefrom the damages sustained by the defendants, by reason of the non-delivery of all the lumber. (*Chitty on Con.* 446, *7th Am. Ed.*; *Banker* v. *Hoyt*, 18 *Pick.* 457.) These damages were incurred by the defendants in sending lighters for the lumber, which they could not obtain, and amount to $110. The damages claimed by them on a re-sale of the lumber, do not legally result from the breach of the contract, and not being specially alleged in the answer, ought not to be allowed. The judgment should be for $1833,70, with costs in the court below, after deducting the costs of this appeal, which the plaintiff should pay.

Ordered accordingly.

VON SCHMIDT *et al. vs.* HUNTINGTON *et al.*

Under the Mexican law, which formerly prevailed in this country, the proceeding of *conciliacion* was necessary, before the institution of a suit in one of the *ordinary* courts; and *it seems* that it was the proper and regular proceeding to be taken, even since the acquisition of the country by the Americans. The want of it, however, is to be regarded but as a formal and technical defect, which this court, on appeal, is authorized to disregard by the statute of February 28th, 1850, and the court will not reverse a judgment merely because the formality of *conciliacion* has not been gone through with before the commencement of the suit.

If *conciliacion*, however, had been necessary to confer *jurisdiction* upon the *ordinary* judge, it would have been a fatal defect, which could not be overlooked, or disregarded even on appeal.

In what cases *conciliacion* was necessary under the Mexican law, and in what cases unnecessary, considered. *Per* BENNETT, J.

Since the occupation of California by the Americans, the proceeding of *conciliacion* has been deemed a useless formality by the greater portion of the members of the bar, by the courts, and by the people. *Per* BENNETT, J.

Under the Mexican law, custom is sometimes allowed not only to control, limit, modify and interpret the general rules of the system, but even to establish a rule in direct contravention of the positive written law. Thus, custom may attain the force of law, not only when there is no law to the contrary, but when the effect of it is to overturn the previous law which stands in opposition to it. *Per* BENNETT, J.

A statute should be construed so as to take effect upon future, and not upon past transactions; but with the exception of cases within prohibitory clauses, in state constitutions or in the constitution of the United States, it is competent for a state legislature to give to a statute a retro-active effect.

As a general rule, all persons materially interested in the subject matter of a suit ought to be made parties; but where the parties in interest are numerous, a court will allow a suit to be brought by some of them in behalf of themselves and others, taking care that there shall be a due representation of all substantial interests before the court. Thus, where the stock of a joint stock company was divided into money shares and labor shares, and certain holders of the latter description of stock brought suit against certain holders of the former description of stock, without all the persons of either class being made parties; *Held*, The stockholders being numerous, and it being difficult, if not impracticable, to bring them all into court, that the parties before the court were sufficient to authorize it to adjudicate upon their rights, and dissolve the company, and decree a distribution of its effects.

Where a chancery suit is heard on bill and answer, all the allegations in the answer, whether upon knowledge or upon information and belief, are to be taken as true. If the complainant wishes to dispute any of the allegations in the answer, he

must file a replication, and thus enable the defendant to establish them by proof if he can.

Contracts, like statutes, under which a forfeiture is claimed to have accrued, should be construed strictly, and the facts urged in support of the forfeiture ought to be clear and explicit, and not be left to inference and argument.

A *joint-stock association* formed for a definite period cannot be *voluntarily* dissolved, except by the unanimous consent of all the stockholders; if such consent cannot be had, then application must be made to a court to decree a dissolution.

A joint stock association was formed in the city of New York, called the New York Union Mining Company, for the purpose of prosecuting the business of mining in California, and the period during which the company was to continue the business was, by the articles of association, to be from January 1, 1849, to October 1, 1853, with a prohibition against dissolution within one year after the arrival of the company in California, except on certain conditions, which had not been complied with. *Held*, That a portion of the company could not, contrary to the articles of association, dissolve the company at their will and pleasure; but, it being found impracticable to keep the company together, or to prosecute successfully the contemplated enterprise, under the articles of association, the court decreed a dissolution and the distribution of the effects of the company.

The stock being divided into money shares and labor shares, the holders of the latter of which had contributed no capital towards the outfit of the company, had performed no labor beneficial to the company, and had their expenses to California paid out of the funds contributed by the holders of the money shares; *Held*, That the assets of the company should be distributed among the holders of the money shares alone.

Von Schmidt, one of the plaintiffs, having failed to join the company within a reasonable time, *it seems* that his labor stock became forfeited under one of the clauses in the articles of association, which declared *absence without leave* to be a cause of forfeiture, and the other plaintiffs having deserted the company; *Held*, That a resolution of the company declaring their money shares, as well as labor shares, to be forfeited, was valid under the articles of association.

It being for the interest of all parties concerned that the company should be legally dissolved; *Held*, That the costs and a counsel fee, on each side, should be paid out of the fund.

THIS was an appeal from a decree of the court of First Instance of the district of San Francisco. The facts of the case are sufficiently stated in the opinion of the court. The cause was argued in this court by

John W. Dwinelle, for plaintiffs, and

Hall McAllister, for defendants.

By the Court, BENNETT, J. The parties to this suit, plaintiffs and defendants, in conjunction with others, formed a company in the city of New York, in the early part of the year 1849, under the name of the New York Union Mining Company. Articles of association were adopted, which declare that the persons whose names are subscribed thereto, agree to associate themselves for the purpose of prosecuting the business of mining in California, from the 1st day of January, 1849, until the 1st day of October, 1853; and that the company shall consist of not less than twenty-nine operative or working shareholders, who are required to devote their entire time and energies to promote the common interest in such manner as the company shall direct. In addition to various other officers, there was a finance committee provided for, consisting of the treasurer and two other operative shareholders, whose duty it was to take charge of the fiscal affairs of the company. The defendants constituted this finance committee, and the complainants were operative shareholders.

The stock of the company consisted of 338 shares of $250 each, making an aggregate of $84,500. Each operative shareholder was entitled to eight shares, or $2,000 of the stock, and was required, in addition thereto, to subscribe and pay for not less than two other shares. The residue of the stock, being 48 shares, was taken in part by operative shareholders, and in part by persons not otherwise connected with the company. Thus, the whole stock of the company was divided into two distinct species—the one of 232 shares was denominated labor stock, and the other, of 106 shares, was denominated money stock. The articles further provided, that on the 1st day of October, in the year 1853, a meeting of the stockholders should be held in California, at which it was to be determined by a vote of a majority whether the company should continue another year, and the terms upon which it should be continued. There was a number of other regulations, and article 22 was in the following words: "Any operative shareholder, who shall absent himself "during any portion of the time hereby limited, without leave, "or providing a proper substitute, unless relieved by a vote of "a majority of the operative shareholders for good cause as-

"signed, shall forfeit his interest in the labor stock of the company; and any operative shareholder who shall, within three "months after the arrival of the company in California, desert "the company without leave, shall, in addition to his labor "stock, forfeit his two shares of money stock." Other articles, so far as they are of importance in this suit, will be noticed hereafter.

The company arrived in California about the 1st of September, 1849. Peter Von Schmidt, one of the plaintiffs, arrived ten days after, and the other plaintiffs about three months before that date. Previous to the arrival of Peter Von Schmidt, the company had held a meeting, and had expelled him and the other plaintiffs from the company, and declared both their labor and money stock forfeited. On the 26th day of November last, the plaintiffs filed this bill to compel the company to reinstate them, alleging that it was found impracticable to keep the company together, that their labors as a company could have no profitable results, that a dissolution had been resolved upon and declared, that a part of the property had been sold, and that all the residue had been advertised for sale at auction. The bill also alleged that the defendants had been directed by the company to make a dividend of the proceeds of the sales, upon the 232 shares of labor stock, equally with the 106 shares of money stock. The bill prays, in substance, for a decree that the proceeds arising upon the sale of the company's property be distributed amongst the money shares alone, and that the plaintiffs be relieved from the forfeiture of the stock incurred or pretended to have been incurred by them, so that they may receive their dividends, together with the other members, upon all the money shares which they had bought. The bill also prays for an injunction and the appointment of a receiver, but contains no express prayer for a dissolution of the company.

The defendants put in a plea in which it is alleged that the plaintiffs had not brought into court any certificate of failure of *conciliacion* between the parties. The plea was overruled by the court below, whereupon the defendants put in their answer, the material portions of which will be hereafter noticed.

The cause was heard on bill and answer, and a decree was made in the court below, restoring the plaintiffs to their forfeited rights, appointing a receiver, and directing a distribution of the effects of the company equally upon the labor and the money shares. From this decree the appeal is taken by the defendants.

The first point which we propose to examine in reviewing the positions of counsel, is that relating to *conciliacion*. Although this point has been frequently made heretofore, it has not been found necessary in the disposition of any case for the court to express its views upon the subject; but it is now presented in the formal shape of a dilatory exception, put in at the very outset of the proceedings, which we apprehend to be the proper, if not the only method of bringing the question regularly before the court. (1 *White's Recopilacion*, 259, 260, *and* 383; *Escriche Dic. Title*, "*Excepcion*.") Being thus an objection *in limine*, taken in due time and in the appropriate form, it must, if valid, put an end to the whole case; if not valid, it must, nevertheless, be disposed of before the other points of the case can be reached.

The proposition naturally resolves itself into two subdivisions. First, that *conciliacion* is required in this case by the Mexican law; and secondly, that being essential by the Mexican law, it has not been legally dispensed with since the American administration of justice in this country commenced.

First, then, is *conciliacion* required in such a case as the present by the Mexican law? It is provided by article 40 of the 5th Title (*ley*) of the Mexican Constitutional Law, that in order to the due institution of any suit whatsoever, either civil or criminal, for wrongs purely personal, the means of *conciliacion* must be first tried; and that the law will regulate the form of proceeding in such matters, the cases in which *conciliacion* need not take place, and everything else relating to the subject; and by article 29 of the 6th title it is declared, that it will be the province of alcaldes to exercise within their *pueblos* the functions of conciliators.

The Mexican decree of May 23d, 1837, which was made in

pursuance of the above requirements of the Constitution, and which is generally supposed to have been in force in California at the time of the acquisition thereof by the American government, says, that it belongs exclusively to the alcaldes of the Ayuntamientos, and to the justices of the peace in places whose population consists of one thousand persons or more, to exercise within their territory, in respect to all classes of persons, without any exception, the functions of conciliators, according to the above provisions of the constitution. (*Arrillaga's Colleccion de Decretos of* 1837, *p.* 422, *Escriche Dic. Appendix*, *p.* 703, *Ed.* 1842.) It is there provided, that in order that the proceeding of *conciliacion* may take place, whosoever may have to institute any civil suit, the value of which exceeds one hundred dollars, or any criminal suit for severe injuries purely personal, shall make his complaint before the competent alcalde or justice of the peace, demanding, verbally, that the person who is to be made defendant be summoned, in order to proceed in the trial of *conciliacion*. (*See authorities last above cited.*) Article 10 ordains that no complaint, either civil or criminal, concerning injuries purely personal, can be admitted, without proving by a competent certificate that the means of *conciliacion* have been attempted. (*Arrillaga's Colleccion*, 1837, *p.* 419, *and Escriche as above cited.*) After excepting from the operation of article 10 various cases relating to benefices and other ecclesiastical matters, causes which concern the public revenue, the municipal funds of towns, public institutions, and other matters not affecting the case at bar, article 11 proceeds as follows: "Neither is it (*conciliacion*) necessary in order to com- "mence the summary and very summary possessory actions, "that of the prohibition of a new work, or that of retraction; "nor in order to expedite the making of inventories and the di- "vision of inheritances, nor in other urgent cases of like na- "ture; but if a formal petition should afterwards have to be "put in, which may give rise to a litigated suit, then *conciliacion* "ought to precede it." The same article, after again excepting certain cases of bankruptcy, closes with a general clause requiring *conciliacion*, "whenever any citizen may have to de-

"mand, by due course of law, the payment of a debt, even though "it accrue upon a contract of record." (*Arrillaga and Escriche, as above cited.*) This statute appears to have been only a revision of previous statutes, and but declaratory of a long established law, for we find the same doctrine laid down by *Febrero* (4 *Feb. Mej.* 420, *et seq. ed.* 1834), and by Peña y Peña. (1 *Prac. For. Mej.* 70, *ed.* 1835.) Indeed, its origin is to be traced far back, even to the period of the *Nueva Recopilacion*, in which it is declared, in speaking of the duties of judges, that they shall discourage litigation, as far as in them lies, by using their endeavors to induce parties to compose their differences voluntarily and in a friendly manner, by refusing legal process in cases of a trivial nature, whenever it can be done without prejudicing the lawful rights of the parties; and by making use of persuasion, and all other means which their discretion shall dictate, to convince the parties of the benefit which will result to them from a composition of their differences, and the damage and expense inseparable from litigation, even when accompanied with success. (4 *Feb. Mej.* 420; 1 *Prac. For. Mej.* 72, and see also 5 *Tapia Feb.* 209, 213.) It thus appears to be the policy, not only of the Mexican statute above referred to, but also of the Spanish and Mexican law, in all cases of a civil nature, which are susceptible of being completely terminated by the agreement of the parties, to require conciliatory measures to be tried until they shall result either in a satisfactory arrangement or in the entire failure to accomplish a reconciliation. In the latter event, and in that event only, are the parties allowed to resort to the regular and formal mode of litigation in the ordinary courts.

This being the general rule, *conciliacion* was necessary, under the Mexican statute in the case before us, unless it may be brought within some of the exceptions enumerated in that statute. Does it fall within any of those exceptions? It is not a verbal process, nor does it concern any benefice or other ecclesiastical matter, nor the public revenue, nor the municipal funds of towns, nor public institutions, nor minors, nor persons deprived of the administration of their property, nor vacant

inheritances, nor taxes, contributions or imposts. It belongs to neither of the three classes of possessory actions, nor interdicts of possession; it is not the denouncement of a new work, nor a proceeding called a retraction, nor a case of bankruptcy, to which it was endeavored to be assimilated upon the argument; it has no relation to inventories of the estates of deceased persons, nor to the division of any inheritance between heirs, legatees, or devisees. It must fall, if it may be brought within any of the exceptions, under the general terms of that clause of the statute, which, together with inventories and division of inheritances, also excepts "other urgent cases of the like nature." We should think that it might properly arrange itself under these general words, were it not for the clause immediately succeeding, which requires *conciliacion* previous to preferring a formal petition, which may have the effect of occasioning a litigated suit, and in cases where a party has to seek by process of law the payment of a debt, even though the claim be based upon a contract of record. But in order to attain the end prayed for in the bill of complaint, it was necessary that a formal petition should be filed, which might have the effect of giving rise, and which has actually given rise, to a litigated suit.

It is to be observed that, with the exception of those cases relating to ecclesiastical matters, the public revenues either of cities or of towns, and certain other subjects of a political character, and affecting the public welfare, all of which stand upon peculiar grounds of their own, the cases in which the preliminary effort at *conciliacion* is dispensed with, are those in which some step is necessary to be immediately taken, in order to protect temporarily the rights of the party complaining, or to prevent some injury threatened to his property; but that in none of the cases are the claims of the parties to the subject matter in contest finally and absolutely adjusted. They are all in the nature of incipient or introductory proceedings for the purpose of procuring from the court an interlocutory order or decree, determining the temporary possession, control, or situation of the property, previous to the parties entering upon a full and formal investigation of their rights concerning it.

Thus the summary and very summary interdicts of possession are instituted in order to enable the party complaining to acquire, retain, or recover simply the possession of the thing in controversy, until the title to it can be settled finally by the adjudication of the court in an ordinary suit. (1 *Feb. Mej.* 351; 4 *Id.* 272; *Tapia's For. Prac.* 233, 234, *ed.* 1829.) They partake somewhat of the nature of injunctions in courts of equity, and are applied to similar purposes, that is to say, to restrain the undue exercise of rights, to prevent threatened wrongs, to restore violated possessions, and to secure the peaceable and quiet enjoyment of property. (2 *Story's Eq. Juris.* 201 *to* 204.) The denouncement of a new work, being a proceeding to restrain the erection of some new work, as for instance a building, which may, if completed, injuriously affect the property of the complainant, is of a character similar to the interdicts of possession. (4 *Feb. Mej.* 277 *et seq.; Escriche Dic. Title "Denuncia de Obra Nueva," p.* 185.) And in the case of retraction, or the rescinding of a sale upon the claim of the plaintiff to be allowed to take the property at the same price for which it was sold to a third person, although certain steps may be taken for the security of the property previous to *conciliacion*, yet, if the vendee, on his appearance before the judge, resists the claim of the plaintiff, then a litigated suit becomes necessary, which must be preceded by the trial of *conciliacion*. (3 *Feb. Mej.* 75.) It follows from the above view of the nature of those cases which do not require attempts at *conciliacion*, that suits known in the American system of jurisprudence as injunction suits, not praying for relief further than to restrain the defendant from the performance of a specific act, would not, as a general thing, require *conciliacion* under the Mexican system; and if the object of this suit had been simply to prevent the threatened sale of the property of the company, without praying for a final disposition and settlement of its affairs, and distribution of its effects, we should have thought that it was one of those urgent cases contemplated by the statute in which *conciliacion* might have been dispensed with. But before any step could have been taken to obtain the extent of relief prayed

for by this bill, we apprehend that it was an essential prerequisite that conciliatory measures should have been tried, within that portion of the statute which makes *conciliacion* necessary in those cases in which a formal petition is to be put in, which may occasion a litigated suit.

Conciliacion, then, having been necessary in this suit under the Mexican statute, we come next to the second subdivision of the point under discussion, which is, whether this case can claim any legal dispensation from the effects of that statute.

It is claimed that a certificate of the failure of *conciliacion* must be presented in order to confer jurisdiction upon the court. If this be so, the judgment appealed from is utterly null, and we know of nothing which can give it validity. The ground of nullity is assumed by many, if not most, of the writers upon the subject, but the latest authority which we have seen holds the reverse, and the views contained therein are satisfactory. (5 *Tapia Feb.*, 215, 216, *ed.* 1845.) The proceedings, therefore, although irregular under the statute, are not void for want of jurisdiction; and the question then is, whether that irregularity may in any way be cured?

This question might, perhaps, be satisfactorily answered by saying, that since the acquisition of California by the Americans, the proceeding of *conciliacion* has, in all cases, been deemed a useless formality by the greater portion of the members of the bar, by the courts and by the people; that it has, in fact, passed into disuse and become obsolete. In Mexican jurisprudence, as in that of other countries, custom is sometimes allowed not only to control, limit, modify, and interpret the general rules of the system, but even to establish a rule in direct and palpable contravention of the positive written law. It is the teaching of the books that custom may attain the force of law, not only when there is no law to the contrary, but when the effect of it is to overturn the previous law which stands in opposition to it—whence arises the maxim, that there may be a custom without law, a custom contrary to law, and a custom according to law. (*Escriche, Derecho Español*, 23, 24; *Escriche, Dic. Title* "*Costumbre;*" 1 *Feb. Mej.* 55 *to* 61.)

But it is unnecessary to base our conclusion upon the ground of custom. Section 26 of the act of February 28th, 1850, regulating appeals, authorizes this court to reverse, affirm, or modify any judgment, order, or determination appealed from, in whole or in part, and as to any or all of the parties, to grant new trials, and render such judgment as substantial justice shall require, without regard to formal or technical defects, errors, or imperfections, not affecting the very right and justice of the case. Notwithstanding the importance which seems to be attached to the trial of *conciliacion* by Spanish and Mexican writers, (*see* 5 *Tapia Feb.* 209, *and* 1 *Prac. For. Mej.* 72 *et seq. by Peña y Peña*,) and even conceding that it may operate beneficially in the nations for which it was originally designed, still, amongst the American people it can be looked upon in no other light than as a useless and dilatory formality, unattended by a single profitable result, and not affecting the substantial justice of any case. Viewing, then, the absence of a certificate of the failure of *conciliacion* as a mere formal and technical defect, error or imperfection, we feel ourselves fully justified in overruling the objection founded upon it. Nor does it strike us that there is any force in the argument that the statute of February 28th ought not to be construed so as to give it a retro-active operation. As a general rule of statutory interpretation, it is undoubtedly true that a statute should be construed to operate upon the future, and not upon the past; but, with the exception of those cases which come within the purview of prohibitory clauses in state constitutions, or in the constitution of the United States, we know of no case in which it is not competent for a state legislature to give to a statute a retro-active effect; and it is the very scope and object of the statute of February 28th to provide for the decision upon appeal of cases which had been tried previous to its passage.

We have entered thus fully into an examination of the doctrine of *conciliacion*, and given our views of it at length, in order that the profession may understand, that the objection for the want of conciliatory measures is, so far as the court is concerned, disposed of now, and, as we sincerely hope, forever.

The next point to be considered is as to parties. It is claimed by the counsel for the appellants that the bill should be dismissed for defect of parties. The general rule upon this subject is sometimes stated to be, that all persons materially interested in the subject matter of the suit ought to be made parties, and sometimes it is limited to those who are interested in the object of the suit. But whether the one definition or the other be adopted, in neither case is the rule founded on any positive and uniform principle, nor admits of being expounded by the application of any universal test. It can scarcely be said to be useful as a practical guide, for it is open to so many exceptions, and qualifications, and limitations, that the nature, extent and application of it cannot be always clearly defined. The principle upon which these exceptions are founded is, that courts will not suffer the rule to be so applied as to defeat the very purposes of justice, if they can dispose of the merits of the case before them without prejudice to the rights or interests of other persons who are not parties, or if the circumstances of the case render the application of the rule impracticable. (*Story's Eq. Pl. sec.* 76, 77.) One exception is, where a person is beyond the jurisdiction of the court (*id.* 78,) which would apply, to some extent, to the case in hand, for it is conceded that some of the money shareholders of the company are not within the state. Another exception is, where the persons interested are numerous, and it would be impracticable to join them without almost interminable delays, and other inconveniences which would obstruct and probably defeat the purposes of justice; neither is the general rule adhered to in cases in which, consistently with practical convenience, it is inapplicable, for then it would destroy the very purposes for which it was established. Where the question is one of a common or general interest, or where parties form a voluntary association for public or private purposes, the persons interested are commonly numerous, and any attempt to unite them all in the suit would be, even if practicable, exceedingly inconvenient, and would subject the proceedings to the danger of perpetual abatements and other impediments, arising from intermediate deaths or other accidents

or changes of interest. (*Story's Eq. Pl. sec.* 93, 96, 97.) Many adjudications, in which these principles have been applied and illustrated, are collected and arranged by Judge Story in his work on equity pleadings, the result of which is, that where the parties in interest are numerous, courts will allow a bill to be brought by some of them on behalf of themselves and others, taking care that there shall be a due representation of all substantial interests before the court; and no distinction is made whether the bill be filed by or against persons not members of the association, or by certain members against others of the same association. It is true that it has been held in some of the cases that where the bill seeks the dissolution of the company, all the members must be made parties, however numerous they may be, but this doctrine has been greatly qualified if not positively overturned in the more recent authorities; and the reasons against its application advanced by Judge Story, (*Eq. Pl. sec.* 134, 135,) are so cogent and conclusive, that, even if express authority did not support us, we could not hesitate, in establishing a precedent in a new state, to declare that it receives our unqualified dissent. We would in this respect take for our guide the wisdom of Lord Cottenham declared in *Taylor* v. *Salmon*, (4 *Mylne & Craig's Rep.* 134,) that "it is the duty of "the court to adopt its practice and course of proceeding as far "as possible to the existing state of society, and to apply its juris- "diction to all those new cases, which from the progress daily "making in the affairs of men, must continually arise, and not, "from too strict an adherence to forms and rules established "under very different circumstances, decline to administer jus- "tice and to enforce rights for which there is no other remedy." Upon the whole, the 48th rule of the supreme court of the United States, adopted in 1842, appears to furnish the correct rule for the government of cases of this nature, which is, that where the parties on either side are very numerous and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the

adverse interests of the plaintiffs and the defendants in the suit properly before it.

Although the bill of complaint, in the case before us, does not expressly allege, that it is filed on behalf of the plaintiffs and others claiming the same interest in the effects of the association; it appears, nevertheless, to be the scope of the bill to protect the rights not only of the plaintiffs but also of another numerous class of the stockholders, who are owners of what is termed the money shares; for the bill prays that the proceeds arising from the sale of the effects of the company may be divided amongst all the money shares and the money shares alone. Whilst, therefore, the plaintiffs may properly be deemed to represent the money stockholders, the defendants, who insist that the property of the company should be distributed amongst the money and the labor shares equally, may be regarded as peculiarly representing the labor shares; and thus all the substantial interests of all the members of the company are before the court. The persons interested in the subject matter of the suit are numerous, and from the nature of the enterprise which was the object of the formation of the company, from the condition of the country and the ever changing locations of people engaged in operations in the gold mines of California, it would be, if not utterly impracticable, productive of manifest inconvenience and oppressive delays, to require that all the members of the association should be brought into court before it would proceed to administer justice between any of them. We think that the bill ought not to be dismissed for defect of parties.

Before proceeding to the consideration of the other points raised, it becomes necessary to determine what effect should be given to the allegations of the answer. It is claimed by the counsel for the plaintiffs, that while the matters stated upon the knowledge of the defendants are to be taken as true, those matters which rest upon information and belief are entitled to no weight. We understand the rule very differently. The case has been treated by both parties strictly as a chancery suit,—the subject matter is properly of chancery jurisdiction—the plead-

ings are formal chancery pleadings—and the cause was passed upon by the court below as a chancery cause and was argued as such in this court. The effect of the answer must therefore be governed by the rules of chancery practice, according to which, when a cause is heard on bill and answer, all the material allegations of the latter, whether upon knowledge or upon information and belief, are to be assumed as true. There is, however, this qualification of the rule, that where facts and circumstances disclosed by the answer are wholly inconsistent with a general affirmation or denial contained therein, the former shall prevail over the latter. An answer is regarded, not merely as a response to the charges and interrogatories of the complaint, but as a pleading of the defendant, in which he may set up any matter of defence, whether within his knowledge or not, and consequently if such matter of defence is not to be taken as true when the cause is heard on bill and answer, then it would be in the power of the complainant to preclude the defendant from any defense, not resting in his personal knowledge, by refusing to file a replication and setting the cause down for argument on bill and answer. But it is unnecessary to pursue the subject. The rule, as above stated, is founded in reason and is perfectly well settled.

With this view of the nature and effect of the answer, we are prepared to determine the question of forfeiture of the plaintiffs' shares of stock. The bill is filed by Peter Von Schmidt, Julius H. Von Schmidt, Thomas S. Holman, and Lewis F. Newman. On the argument, nothing was said of Julius H. Von Schmidt, but it was said that two persons by the name of Holman had been expelled from the company. On looking at the names of the subscribers to the articles of association, we find Julius H. Von Schmidt, and but one Holman. There seems to be, in this respect, a discrepancy between the papers and the argument of counsel, which we can account for only upon the supposition that Julius H. Von Schmidt and Julius H. Holman are one and the same person. We shall assume that they are, and if we are wrong, the error may be corrected on the application of counsel.

The case of Peter Von Schmidt differs from that of the other plaintiffs, and the latter all stand upon the same ground. We will first dispose of them. They were expelled from the company and their shares forfeited by virtue of the latter clause of article 22 of the articles of association, which declares that "any operative shareholder, who shall, within three months "after the arrival of the company in California, desert the "company without leave, shall, in addition to his labor stock, "forfeit his two shares of money stock." The only question under this is, whether these plaintiffs did desert the company without leave within three months after its arrival. The company arrived about the first day of September, from which date the three months would begin to run. Did, then, these plaintiffs thus desert within three months from the first day of September? They arrived here some three months previous to the rest of the company, and, after having proceeded to the mines, returned to San Francisco, where they engaged in business on their individual account, for the profits of which they refused to render any account to the company, notwithstanding one of the articles of association required every operative shareholder to devote his entire time and energies to promote the common interest. After the arrival of the company they exerted their efforts to break up and disorganize it, refused to labor for it when directed so to do, or to attend its meetings, refused to accompany a portion of the members who were ordered to proceed and did proceed to the mines, in pursuance of the objects of the association, and openly declared that they no longer considered themselves members of the association, for they could make more money by leaving it and forfeiting their stock than by remaining in it as operative shareholders, and in addition thereto, endeavored to persuade other members to desert the company and co-operate with them in their disorganizing proceedings. Neither of them has contributed his labor or services in any shape to the company, but all of them have, of their own choice, been engaged in pursuits for their private benefit. These are the facts disclosed by the answer and which we must assume to be true; and if they do

not constitute a desertion of the company without leave within three months after its arrival, we can conceive of no state of facts which would amount to such desertion. With this view the company, upon due notice, resolved that these plaintiffs had deserted the company and had thereby forfeited both their labor and money stock. From that forfeiture the court cannot relieve them. (2 *Story's Eq. Juris. sec.* 1324, 1325.)

How stands the case with Peter Von Schmidt? Contracts, like statutes, by reason of which a forfeiture is claimed to have accrued, should be construed strictly, and the facts urged in support of the forfeiture ought to be clear and explicit, and not be left to inference and argument. It appears that Von Schmidt was expelled from the company, and his stock forfeited before his arrival, for the answer states that notice could not be served upon him by reason of his continued absence; and absence without leave is made, by the articles of association, a different offense from desertion without leave, and is followed by different consequences. We do not see that the facts stated in the answer make out a case of desertion, without leave, on the part of Von Schmidt, within the exact period of three months after the arrival of the company in California. He is not, therefore, subject to the penalty imposed by the second clause of the 22d article, and consequently the forfeiture of his money stock is not warranted. The burden of the charge against him is of absence without leave. The first clause of the 22d article provides, "That any operative shareholder who shall ab-"sent himself during any portion of the time hereby limited, "without leave, or providing a proper substitute, unless relieved "by a vote of a majority of the operative shareholders for "good cause assigned, shall forfeit his interest in the labor "stock." It was the duty of Von Schmidt to have used due diligence in reaching California, and making proper allowance for his detention in New York to construct certain machines for the company, the facts warrant the conclusion that he did not use such diligence. His absence was, within the first clause of the 22d article, an absence without leave, which would warrant the resolution of the company forfeiting his labor stock. But

the view we take of the other points in the case, renders it a matter of no moment whether his labor stock has been forfeited or not. There is another subject connected with the case of Von Schmidt, which it becomes necessary to notice. He agreed to complete for the company three gold washing machines for the sum of three thousand dollars, which was paid to him. The company was afterwards obliged to pay two hundred dollars more, in order to get the machines finished. This latter sum must be deducted from the amount of Von Schmidt's portion on the final distribution of the effects of the company.

The next inquiry is as to the dissolution of the company. Was the company dissolved, as the bill alleges, before this suit was commenced? The answer positively denies that the company has declared a dissolution or intended to do so, or that a dissolution has been resolved upon or has in fact taken place. At the same time it admits that an "adjournment" has been made to the first day of September next; that all the property of the company has been sold, and that instructions have been given to the defendants to distribute the proceeds of the sale amongst the shareholders. It is evident that the members of the company have done all in their power to dissolve it, and yet they have been unable to accomplish their object. By the first article of association, the subscribers agree to associate themselves for the purpose of prosecuting the business of mining in California, from the first day of January, 1849, until the first day of October, 1853. By article 27, "All the shareholders "mutually agree, that the company shall not be dissolved before "the expiration of the term above limited, unless the enter-"prise be fairly tried and prove unprofitable: nor without the "unanimous consent of the operative shareholders;" and further, that "In case the operative shareholders shall, at any time after "one year from their arrival in California, determine that said "enterprise cannot be successfully or profitably carried on, then, "but not otherwise, they may by an unanimous vote declare the "dissolution of the company." This company belongs to the class of joint stock associations rather than to that of ordinary partnerships, and it is therefore unnecessary to discuss the

mooted point whether one partner, without the consent of the others, has the right to dissolve a partnership formed for a limited period, (*see Collyer on Part. Ed.* 1848, *p.* 103, *and note.—Story on Part. sec.* 275, 276,—*and* 3 *Kent's Comm.* 55,) for, conceding the affirmative of the question, it by no means follows that the same rule would be properly applied to companies like the one under consideration, although the principles which control the one class, are, as a general thing, applicable to the other. Under the articles of association, the company had no power to declare a dissolution at any time before the first day of October, 1853, except by the unanimous vote of the operative shareholders; and even an unanimous vote could not effect this object until after the expiration of one year from the time of the arrival in California. We say *under* the articles of association; but these, like any other contract, might be cancelled by the mutual agreement to that effect of all the parties. (*Story on Part. sec.* 266, *et seq.*) No such agreement appears to have been made by all the parties, and consequently no dissolution had taken place at the time the suit was brought.

The question then is, ought the court to decree a dissolution? The bill contains no distinct prayer for such relief; it, however, proceeds upon the hypothesis that the company had already been legally dissolved, and seeks to have the property sold, and the avails distributed. This amounts in substance to a prayer for a dissolution; and in disposing of cases belonging to the former order of things, we are directed to overlook informalities. The bill alleges that it had been found impracticable to keep the company together—the answer does not deny it—and we are convinced of its truth. The successful prosecution of gold mining at the present time, under such an organization as is prescribed by these articles of association, appears to us to be an impracticability and a delusion, and in such event it is proper for courts to interfere and decree a dissolution. (*Story on Part. sec.* 390.) Besides, the desire of the members is sufficiently indicated, and being in accordance with the interests of all concerned, ought not to be thwarted.

We come now to the last point of discussion. How shall the

effects of the company be divided? Amongst the money shares alone, or amongst the money and the labor shares equally? In order to determine this, we must endeavor to ascertain the intention of the parties at the time when they formed this association in the city of New York. The contingency of a dissolution before the expiration of one year not having been contemplated, the articles of association contain no provision as to distribution in case of the occurrence of such an event. It is true that article 19 directs the manner in which the division shall take place, in case the company shall determine to dissolve at the end of the period limited in the articles, "or at any other "time." But this last clause must be construed in connection with article 27, which expressly prohibits a dissolution until after the expiration of one year, and can be applied only to the period intervening between the expiration of the first year and the end of the entire term. It was the intention, therefore, that the operative shareholders should render their services to the company for at least one year, in compensation for which they are each allowed eight shares of stock—an allowance which it is impossible to conceive was intended to be made to the operative shareholders merely for superintending the transportation of the effects of the company to California, and immediately selling them. This would be an enormous per centage for factor's commissions. So far, then, as the intention can be gathered from the articles of association, the performance of at least one year's services seems to have been made a condition precedent to the right of the operative shareholders to claim, upon the distribution of the effects of the company consequent upon a dissolution, a dividend upon their labor shares. And this construction is in accordance with the equity of the case. The operative shareholders have consumed some sixteen thousand dollars of the cash capital paid in, in defraying their expenses hither, and we deem this an ample equivalent for all the labor they have performed. The distribution must, therefore, be made upon the money shares alone.

The sole remaining question is as to costs. These should be paid out of the fund. And as, according to the view above

taken, the company could not be legally dissolved, except by the decree of a competent court; and as the filing of the bill was, therefore, for the mutual benefit of all the members, the expense of the proceeding ought not to be sustained by a few of them alone. A counsel fee will be allowed, in the discretion of the district court, not exceeding three hundred dollars on each side.

A decree must be entered dissolving the company as of the date when the judgment appealed from was rendered, (Jan. 24, 1850.) The receiver appointed by the court below, will proceed under the direction of the district court, to sell at public auction all the effects of the company, if there be any remaining unsold, and out of the moneys now in his hands, and which may come into his hands, will pay the costs of the suit and the counsel fees as above directed, and will then make a *pro rata* distribution of the balance of the fund amongst all the money shareholders, with the exception of the two Holmans and Newman, and deducting two hundred dollars from the amount which would otherwise be payable to Peter Von Schmidt. Either party will apply to the district court for any order necessary to carry this decree into execution.

Ordered accordingly.

LINEKER *vs.* AYESHFORD.

The endorsement of a bill of lading, *prima facie*, vests the property in the goods mentioned therein in the endorsee: but a bill of lading is not a negotiable instrument so far as to enable an endorsee, who has no property, either general or special in the goods, and no lien thereon for advances or otherwise, to sue the master of a ship, in his own name, for the non-delivery of the goods, when it appears on the face of the complaint that the plaintiff, the endorsee, is a mere naked agent of the shippers.

An agent, ordinarily, cannot sue in his own name in respect to the subject matter of his agency; and this rule applies to consignees and endorsees of bills of lading, when they are, in truth, but the agents of the shippers.

It is no defence to a suit on a negotiable bill of exchange that the suit is brought in the name of a mere agent or stranger. *Per* BENNETT, J.

Nor is it, of itself, any defence to a suit on a negotiable bill of exchange, that the suit is brought in the name of a fictitious person. *Per* BENNETT, J. HASTINGS, Ch. J. dissenting.

A. of Liverpool, shipped certain goods to San Francisco, and endorsed the bills of lading to the plaintiff, his agent, and became a bankrupt before the arrival of the goods. *Held*, it appearing on the face of the complaint that the plaintiff was a mere naked agent of the shippers, that he could not recover the goods in his own name of the master of the ship, who claimed to hold the goods for the assignees in bankruptcy of A.

APPEAL from the court of First Instance of the district of San Francisco. All material facts are stated in the opinion of the court. The cause was argued by

Gregory Yale, for the plaintiff.

Horace Hawes, for the defendant.

By the Court. BENNETT, J. On the 12th day of February, A.D. 1849, Carsten, Spitzer & Co., and Shelpnor, Lomer & Co., two mercantile firms of Liverpool, shipped on the British ship "Antelope," then lying at Liverpool, and of which the defendant was master, certain merchandise for the port of San Francisco. There were two bills of lading signed by the defendant, in one of which the firm of Carsten, Spitzer & Co. appear as the shippers, and in the other, the firm of Shelpnor, Lomer & Co., and both bills call for the delivery of the goods mentioned therein "unto order or to assigns," and acknowledge the payment of the freight in Liverpool. On the one bill of lading is the following endorsement: "Deliver the within to Thomas H. Lineker or order," (signed) "Carsten, Spitzer & Co."; and on the other is a blank endorsementof Shelpnor, Lomer & Co., and then a special endorsement by Carsten, Spitzer & Co. in the same words as the endorsement first above mentioned. On the arrival of the ship at San Francisco, the defendant refused to deliver the contents of the bills of lading to Lineker, claiming to hold them on behalf of the assignees in bankruptcy of

the shippers, and Lineker accordingly brought this suit to recover their value.

The plaintiff alleges in his petition, "that he is the author-"ized *agent of Carsten, Spitzer & Co.*, and that, *as such, he is* "*the holder* of two certain bills of lading signed by Miles J. "Ayeshford, captain of the ship 'Antelope,' a British ship now "in this port, and that the said bills of lading call for sundry "boxes, bales, packages, casks, &c., goods *shipped on account* "*of said Carsten, Spitzer & Co.* The petition further sets forth that such goods are daily decreasing in value, and that "dama-"ges may result irreparable *to those your petitioner represents*, "if the law does not interfere for their protection,"—and that the plaintiff is apprehensive "that the ship will depart and "carry off the aforesaid goods of your petitioner, and those he "represents will be defrauded of their just rights in the same." It is also averred that the plaintiff, in expectation that the bills of lading would be complied with, has rented a house and lot for the purpose of establishing himself as a merchant in San Francisco, and that in consequence thereof, and of the depreciation in the value of the goods in question occasioned by the constant arrivals of goods of a similar description, he and those he represents have incurred damages to the amount of two thousand dollars.

After a great variety of proceedings in the course of the cause, consisting of answers, exceptions, affidavits, orders, arguments, and testimony, judgment was finally rendered by the court below in favor of the plaintiff for seven thousand dollars, the value of the goods at this port, eight hundred dollars for the damages sustained by the plaintiff for the detention, and three hundred and thirty dollars costs of suit. From this judgment the appeal is taken.

Upon the argument numerous points were raised by the counsel for the appellant, involving not only the regularity of the proceedings but the jurisdiction of the court below, which, however, the view this court takes of the case renders it unnecessary to examine. The question principally discussed at the bar, and the one which chiefly attracted our interest, was whether

the plaintiff could maintain the action in his own name, and upon the solution of this question our judgment will be based.

It is claimed by the counsel for the appellant, that the plaintiff has no property either general or special in the goods mentioned in the bills of lading, and no beneficial interest therein, either by way of lien or otherwise, and that, appearing as the naked agent of Carsten, Spitzer & Co., he cannot in that character maintain his action; whilst on the other side it is insisted, that bills of lading are negotiable instruments, and that, in this case, the endorsement of the bills transferred to the plaintiff the property in the goods, and constituted him the legal owner—and that, even if this were not so to that extent, yet the plaintiff should be regarded as a factor or commission merchant, and that, viewed in this light, he has a sufficient interest in the goods to entitle him to sue in his own name.

If the action can be sustained, we think it must be upon one of the two following grounds: First, that a bill of lading is a negotiable instrument to the same extent and with the same effect as a bill of exchange; or secondly, that the plaintiff had some property in the goods in question either general or special, or some lien upon them as factor or otherwise. Unless one of these two propositions can be sustained, we see no reason why the defendant should be made liable to the plaintiff more than to any other stranger for the value of the goods.

First, then, is a bill of lading a negotiable instrument? If it be so, in the sense of the negotiability of bills of exchange, then this suit may be sustained by the plaintiff wholly independent of the question whether he has any interest in the goods mentioned in the bills of lading or not; for it is elementary law, in support of which no authorities need be cited, that a suit may be brought upon a negotiable bill of exchange in the name of a fictitious person, or in the name of a mere agent or stranger; and that, even though it should clearly appear, in the former case, that the plaintiff was a fictitious person, and in the latter, that he was a naked agent or stranger, having no interest whatever in the money sought to be recovered, yet in neither event could the action for that reason be defeated. That

a bill of lading may, like all other contracts, be assigned and the property in the goods therein mentioned be transferred to the assignee, admits of no doubt; and it matters not whether such assignment be made in full, or in the abbreviated form of a simple endorsement. But that is a very different thing from negotiability.

We are aware that not only in text books, but even in the dicta of judges of no inconsiderable authority, bills of lading are said to be susceptible of negotiation. Such is the doctrine advanced in *Smith's Mercantile Law*, 287; and in *Thompson* v. *Downing*, (14 *Meeson & Welsby*, 403,) a bill of lading is spoken of as *quasi* negotiable; but we do not know of any one case in which the doctrine of negotiability has been carried out into an express adjudication. The point is alluded to by Chancellor Kent, (2 *Comm.* 547, 548,) who says that it remains to a certain degree, still floating and unsettled; and this also appears to be the condition of the question under the civil law. (*Id.* 548, *note* "*e*".) In the American note to *Lickbarrow* v. *Mason*, (1 *Smith's Leading Cases*, 649,) the whole matter is very ably and elaborately reviewed and discussed, and the conclusion is deduced from a full examination of all the authorities both English and American, that a bill of lading is not a negotiable instrument. In *Thompson* v. *Downing* above cited, although it was conceded that an endorsement and delivery of a bill of lading might vest the title to the goods while *in transitu* in the endorsee, yet it was held that the instrument was not negotiable, and that suit could not be brought upon it in the name of the endorsee; and we think that the opinion expressed in *Birckhead* v. *Brown*, (5 *Hill*, 635, 646,) that in this country, no instruments are negotiable but regular promissory notes and bills of exchange, appears to be entirely correct. A bill of lading, then, not being a negotiable instrument like a bill of exchange, the plaintiff cannot recover in his own name upon the contract itself, independent of the question of his ownership of the goods—and if he can recover at all, it must be under the second proposition above stated, that he has some property in, or lien upon, the contents of the bills of lading.

Secondly. Has, then, the plaintiff any property in the goods, or any lien upon them? He is not the general owner—the petition itself clearly shows that Carsten, Spitzer & Co. are the general owners. He has no special property, for the case falls within none of the several classes of bailments. And he has no lien—for the goods never came to his possession. What is meant by the term lien? Possession is always essential to its existence. It is a right in one man to retain that, *which is in his possession*, belonging to another, until certain demands of the person in possession are satisfied. (*Story on Agency*, § 352.) and the lien of agents falls within the definition; (*Id.* § 353,) It is true that in section 361 the author says, where property is at sea, the delivery and endorsement of the bill of lading will confer a constructive possession, sufficient to create a lien; but it is manifest that he intends to limit that rule to cases in which advances have been made, or bills accepted, or incidental charges incurred upon the faith of the shipment. (*See* § 377.) In the case at bar no advances have been made, no bills accepted, and no incidental charges incurred, and the plaintiff can claim no benefit from that rule. The same distinguished jurist further says, (*see* § 361,) that if the thing has not yet arrived to the possession of the party, but is still *in transitu*, or if he has only a right of possession, the lien does not attach thereon. Chancellor Kent's rule is even more restrictive of the right of lien, than that laid down by Judge Story. Possession of the goods, he says, (2 *Kent's Comm.* 638,) is necessary to create the lien; and the right does not extend to debts which accrued before the character of factor commenced, nor where the goods do not, in fact, come to the factor's hands, even though he may have accepted bills upon the faith of the consignment, and paid part of the freight: and again at page 639 he declares, that possession is not only essential to the creation, but also to the continuance of the lien. In *Ryberg* v. *Snell*, (2 *Wash. C. C. Rep.* 403,) it is held, that the receipt of a bill of lading by a factor, to whom his principal is indebted, will not amount to constructive possession of such goods, nor give a right of lien on them for the balance of accounts; and in *Walter* v. *Ross*, (*Id.* 283,) it is held

that the goods themselves must come to the factor's hands, in order that the lien should attach, and that the owner may prevent it from attaching, either by selling the goods before this occurs, to a third party, or by revoking the factor's authority and entrusting them to another person.

We have thus far seen that, a bill of lading not being negotiable, and the plaintiff having no property in the goods in controversy, and no lien upon them, there is no *principle* of law upon which this action can be sustained. The only remaining inquiry, therefore, is whether this case comes within any of those classes of cases, which appear to have been decided, not only upon no principle, but in direct violation of all principle. It is by no means intended to find fault with the doctrine, that if a bill of lading be assigned by the consignee *bona fide*, for a valuable consideration, and without notice of any adverse interest, the property in the goods mentioned therein becomes vested in the endorsee. This is settled by the case of *Lickbarrow* v. *Mason*, before referred to, and the rule has been adhered to both in England and in this country ever since that decision. (2 *Kent's Comm.* 548, 549.) Neither is it intended to question the position that the consignee or endorsee of a bill of lading is in general to be deemed *prima facie* the owner of the goods, if they are shipped on account and risk of the consignee. But the *prima facie* case made by the bill of lading is liable to be rebutted. The instrument itself is but a receipt, which may be opened to let in evidence of the real facts—it may be explained as to the quantity of property shipped—it may be contradicted as to the shipment of all the articles mentioned—it may be shown that it was the intention of the parties that the property should not vest in pursuance of its terms—and even after endorsement it is capable of explanation to show the real intent of the endorsement. (*Abbott on Shipping*, 401 *to* 405, *and* 414 *in note;* 1 *Chitty Pl.* 5, 6, *Ed.* 1840.) Whether the plaintiff, then, is to be regarded as consignee or endorsee, it is competent to examine into the real nature of the case, and ascertain from evidence beyond the bill of lading what his true position was. This evidence, being proof of record, and consequently,

the highest that could be adduced, the plaintiff himself has furnished upon the face of his own petition—from which it appears that, whatever may have been his *prima facie* position by virtue of the endorsement of the bills of lading, his true character is not that either of consignee or of endorsee, but that of naked agent of the shippers; and we have seen that, upon principle, he cannot maintain his action. How then does the case stand upon positive authority?

An agent, ordinarily, is not entitled to sue in respect to the subject matter of his agency. (1 *Chitty Pl.* 6, 7; *Story on Agency*, 486, § 391.) And this rule has been strictly applied in numerous cases, where suits have been brought by consignees and endorsees of bills of lading, who were in reality only agents of the shippers. These cases are collected and reviewed at considerable length in *Abbott on Shipping*, in the chapter which treats of the "contract for conveyance in a general ship"; and the result which is deduced therefrom by the author (*pp.* 411, 414,) appears to be in substance, that if the person to whom the delivery is ordered by the bill of lading, is only the agent of the shipper, and has no property in the goods, he cannot maintain an action in his own name against the master for not delivering them—not in assumpsit, for the contract in the bill of lading was not made with him, but with a third person, the consignor of the goods—not in trover, because no property having passed to him, *he can have no right to complain of their non-delivery or conversion as an injury to himself.* These reasons why an action cannot be maintained by an agent, appear to us to be entirely conclusive. Yet in *Morrison* v. *Gray*, (2 *Bing.* 260,) and in *Griffith* v. *Ingledew*, (6 *Serg. and R.* 429,) the courts came to a different conclusion. These cases seem to proceed on the principle, that the legal property, as distinguished from the equitable interest, in a bill of lading and in the goods mentioned therein, is in the consignee or endorsee, though he be but agent; whereas we apprehend, that, with the exception of these two cases and an anonymous decision of Lord Ellenborough cited in *Paley on Agency*; 364, it has always been held that the legal property in a chose in action re-

mained in the assignor notwithstanding the assignment. The view taken in *Gordon* v. *Howland*, (2 *Pick.* 599,) presents the effect of the delivery or endorsement of a bill of lading in its true light; which is, that neither the one nor the other has any effect in passing property, except as evidence of a sale of such property, or as amounting to a symbolical delivery, and having the same effect as the sale would have had, in the absence of the bill, on the delivery of any other symbol of possession; so that where property is sold, and the bill of lading at the same time endorsed, it is the bargain and sale which take effect, and not the mere fact of endorsement. This being so, we see no ground upon which the doctrine of *Morrison* v. *Gray*, and *Griffith* v. *Ingledew*, that the legal property in the goods may be in the endorsee of a bill of lading, where he is shown to be a mere agent, can be supported.

We were referred upon the argument, to cases in which it has been held that factors may sue in their own names; but those were cases where the goods had come into the actual possession of the factor, and where by reason of such possession he had a special property in them, and was entitled to maintain an action for injuries to them, and, when sold, for the price. But the plaintiff can claim nothing from those cases, for he never had the possession.

Our conclusion, then, is, that a mere agent of the shippers, whether called by the name of factor, commission merchant, consignee or endorsee, having no property in the goods either general or special, and no lien upon them for advances or otherwise, cannot maintain an action for their non-delivery against the ship-owner or master, who claims to hold the goods for the assignees of the shippers.

The judgment of the court below must, therefore, be reversed, and the proceedings remitted to the district court of the district of San Francisco, in order that judgment may there be entered for the defendant for his costs in this court and in the court below.

Ordered accordingly.

Hastings, Ch. J. From that part of the above opinion which declares that "it is elementary law, in support of "which, no authority need be cited that a suit may be brought "upon a bill of exchange in the name of a fictitious person," I dissent.

Though the above language is *obiter dictum* and of no binding authority, yet it is well known that *obiter dicta* are often quoted as authority, and are generally received as such, their weight depending much upon the character of the court that utters them, and the positive language used in expressing them. I do not think authority can be cited in support of the above doctrine, and so far from its being correct every writer upon bills of exchange and promissory notes asserts the contrary in effect.

Chitty in his work on Bills, (*p.* 158,) says: "A bill payable "to a fictitious person or his order, is in effect a bill payable to "bearer, and may be declared on as such in favor of a *bona fide* "holder ignorant of the fact. But if the plaintiff himself at the "time he received such a bill knew of the payee being fictitious "and discounted the bill for the benefit of the drawer, he can-"not recover against the acceptor although he also accepted "with full knowledge of the fact."

If the above doctrine be correct, any one can readily conceive with what facility our records may be made up of fictitious beings, mere shadows. Besides, this doctrine is fraught with much mischief; it encourages the drawing of bills in favor of fictitious parties; a practice which has always been condemned by the courts of England, as such bills were at one time both in England and France employed as a cloak for usury and fraud.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA,

IN JUNE TERM, 1850.

THE PEOPLE, *ex rel.* THE ATTORNEY GENERAL, *ex parte.*

This court is strictly an appellate tribunal, and has no original jurisdiction except in cases of *habeas corpus;* and consequently is not empowered to issue a writ of *quo warranto*, for the purpose of inquiring by what authority a person exercises the duties of a collector of the foreign license tax.

The court being created by the constitution, and its powers being therein defined, the jurisdiction conferred by the constitution must be taken as exclusive of all other jurisdiction.

The constitution has not clothed this court with the powers and jurisdiction of the court of king's bench in England.

On petition of attorney general for a writ of *quo warranto* against a tax collector; *held*, that the court had no jurisdiction, and the prayer of the petition was denied.

BY an act of the legislature passed at its first session, entitled " an act for the better regulation of the mines, and the govern- " ment of foreign miners," foreigners were not permitted to mine in this state without obtaining a monthly license for that purpose, for which every foreigner was required to pay the sum of twenty dollars per month. In order to test the constitutionality of this act of the legislature, the attorney general presented a petition to this court, in which he set forth that L. A. Besançon had been appointed and commissioned "collector of licenses "to foreign miners" for the county of Tuolumne, and that

by virtue of such appointment, he had collected a considerable amount of money from foreigners engaged in mining, who were residents of the county of Tuolumne, and that he was still proceeding in the exercise of his office. The petitioner claimed that the act of the legislature was contrary to, and in violation of, the constitution of the United States and the constitution of this state, and the treaties of the United States with foreign nations, and particularly in violation of the treaties made by the United States, respectively, with Great Britain, France, Mexico, and Chile; and that the collection of the license tax by Besançon was an unwarrantable usurpation of office, and was working great injury to the interests of society and the welfare of the state. The petitioner, thereupon, prayed that leave might be granted him to file an information in this court in the nature of a *quo warranto* against the said Besançon, and that he should be required to appear and show by what authority he exercised the office of "collector of licenses to "foreign miners."

S. Heydenfeldt, on behalf of the attorney general.

By the Court, Hastings, Ch. J. The counsel who appears for the attorney general in support of this petition, has, with much ability, urged upon the consideration of this court the two following points:—

1. The jurisdiction of this court to issue writs of *quo warranto*.

2. The merits of the present petition. The merits of the application ought not to be further inquired into, (if the court possess the jurisdiction,) than to ascertain whether there be reasonable ground for making the investigation proposed, inasmuch as such a question should remain open and undecided until all parties in interest shall be fully heard. Therefore this position of the counsel will not be further examined on the present petition. As to the jurisdiction of this court to issue such writs, it becomes important to consider the consequences which are to follow directly affecting the rules of practice in this court,

should we entertain such a jurisdiction. It will be conceded that the office of this writ is to prevent the usurpation of any office, franchise or liberty, as also to afford a remedy against corporations for a violation of their charters tending to a forfeiture thereof. (*Graham on Jurisdiction of Supreme Court*, 198.) It must follow, from the exercise of the remedies which this writ affords, that juries are to be empannelled to try the various issues of facts which, from the nature of the investigation, would be of a wide range and of the most exciting character. Another consequence is the introduction into this court of rules of pleading of courts of original jurisdiction as to the making up of issues, subpœnaing witnesses, taking of depositions, granting continuances, rendering final judgments, and issuing final process.

Such being some of the consequences resulting from this jurisdiction, the question is at once suggested, whether the framers of the constitution of this state and the legislature intended to confer it upon this court, and whether by necessary implication we are not bound to infer an absolute inhibition against the exercise of such power. The legislature have not provided this court with a jury in any case, nor authorized it to cause an issue of facts to be made up in this court and referred to another court for trial. It is intended by the policy of our judicial system that all issues of facts are to be tried before the district and other inferior courts of this state.

The legislature have, however, in the act organizing this court armed it with all writs and process which may be necessary and incidental to an appellate jurisdiction, as by the seventh section of said act, it is provided that "the said court and each "of the justices thereof shall have power to issue writs of "*habeas corpus*, *mandamus*, *injunction*, *certiorari*, *supersedeas*, "and such other writs and process known to the law as may be "necessary to the exercise of their jurisdiction."

It is contended by counsel that as the kind of jurisdiction is not defined in the above clause it may mean other than appellate jurisdiction.

The fourth section of the sixth article of the constitution

provides as follows:—"The supreme court shall have appellate "jurisdiction in all cases where the matter in dispute exceeds "two hundred dollars, when the legality of any tax, toll or im- "post or municipal fine is in question; and in all criminal "cases amounting to felony or questions of law alone, and to "issue writs of *habeas corpus*. They shall also have power to "issue all other writs and process necessary to the exercise of "their appellate jurisdiction."

The counsel holds that this section does not exclude from this court the exercise of other than appellate jurisdiction, and in support of this construction, refers to similar clauses in the constitutions of several of the states to which is appended the word "*only*" or other words of negative import. It is difficult to perceive how the presence of this word could in any manner substantially affect the jurisdiction of this court.

It is said by the counsel that this court was created the highest judicial tribunal of the state by the people, and that it holds the same relation to the people of the state as the court of king's bench to the king of England at the time of the organization of that court.

Whatever may be the practice of the king's bench as to writs of this nature, it is clear that the power which created this court has declared what its jurisdiction is. That power did not confer upon this court all the prerogatives and undefined power of the court of king's bench when the common law should be adopted, and which would have been inferred if its jurisdiction had not been defined. If the declaration of this jurisdiction be not exclusive of all other, why, it may be asked, define it? Without the use of the words, the court would possess "appellate jurisdiction." And if, as is contended, the court can exercise all other jurisdiction than that of the kind specified, then it may entertain appeals in any case where the matter in dispute is less than the sum of $200, and thus it must follow, (to give the language in the constitution meaning,) that we are forced to the inference that all other jurisdiction than that of an appellate court, and all matters incidental thereto, are excluded. The only original jurisdiction conferred either by the act of the legisla-

ture or the constitution, is in the isolated case of issuing writs of *habeas corpus*. If it had been intended either by the framers of the constitution or the legislature to bring under the cognizance of this court any other matters of original jurisdiction, it is but reasonable to suppose that this process alone would not have been designated.

This court, then, being clothed with all the powers necessary for the exercise of a general appellate jurisdiction, it will exercise a supervisory control over all the inferior courts of this state, and when the district court shall refuse to afford the relief which it alone has the power to grant, may issue the writ of *mandamus* commanding the necessary process to be issued, and, if such court shall usurp a jurisdiction, may by its writ of injunction or prohibition prevent such abuse of power, and when such courts commit errors in the exercise of their powers, correct such errors on appeal.

If the district judge of the proper district refuse to issue the writ prayed for in the pending petition, it being a writ of right, we do not at present doubt our power to compel the judge or court to issue such writ on proper showing to this court.

In viewing thus the powers of this tribunal, we give due weight to the argument of counsel that this court does possess all judicial power of a court of final appeal, except in the cases which may hereafter be liable to be removed to the federal supreme court, and clothe ourselves with all judicial power of which we are not divested by the constitution and laws of this state.

To the subjects of foreign powers on terms of amity and favor by treaty with our government, in whose behalf an appeal was made on the argument, who may feel that their rights, as such, are violated by the act of the legislature in question, we do not declare that our courts of justice can afford no relief.

The initiation to the investigation of their grievances can be taken in the proper court, and if aggrieved by its decision, an appeal can be prosecuted to this court.

It is suggested by counsel that the investigation proposed

would not involve an issue of fact, that therefore the prayer of the petition should be granted.

It cannot well be conceived how a distinction could be made between writs which would lead to an issue of law or of fact. The present petition, probably, presents as purely an issue of law to be tried on the return of the writ as any case could, and yet if the defendant should appear and traverse that part of the petition which charges the defendant with collecting a considerable amount of money from foreigners, and the fact charged that such foreigners are residents of the proper county in this state, he would by the bill of rights be entitled to a trial by jury.

The writ, therefore, for the foregoing reasons, is refused.

WARNER *vs.* HALL.

The legislature not having authorized an appeal to the supreme court from a judgment of a county court, this court cannot issue a writ of *certiorari* to a county court for the purpose of reviewing a judgment rendered in the latter court.

APPLICATION for a writ of *certiorari* to a county court. Warner instituted proceedings before a justice of the peace in the city of San Francisco, against Hall, under the statute of forcible entry and detainer, and recovered judgment against him for restitution to the possession of the premises claimed, and for $180 damages. Hall appealed to the county court of the county of San Francisco, where the judgment of the justice was affirmed. He now applies for a writ of *certiorari*, "to remove into "this court the process, pleadings, proceedings, evidence, objections, and exceptions of counsel, and the ruling of the court "thereupon, and the judgment rendered in said cause."

Allen T. Wilson, for the application.

By the Court, BENNETT, J. The constitution has not enume-

rated the courts from whose judgments an appeal will lie to the supreme court, and the statutes have not conferred upon us appellate jurisdiction over judgments of county courts. It is true, the constitution declares that this court shall have appellate jurisdiction in all cases where the matter in dispute exceeds two hundred dollars, and that the statute has empowered us to issue writs of *certiorari* where they may be necessary in the exercise of our jurisdiction. (*Act to organize the supreme court*, passed Feb. 14, 1850, § 7. *Constitution*, *Art.* 6, § 4.) But the court cannot exercise the jurisdiction conferred by the constitution, until the mode in which it shall be exercised is prescribed by statute. We entertain appeals from the district courts, because the statute has provided the means by which, and defined the manner in which, they may be brought before us and determined. But no such provision has been made in relation to judgments of county courts; and until that is done, I do not see how we can properly review them. The authority to issue writs of *certiorari*, given by the statute above cited, is to be regarded only as auxiliary to the complete jurisdiction of this court over proceedings in the district courts. Thus we may, by virtue of this statute, issue such writs for the purpose of reviewing summary proceedings of the district courts, or of bringing up, in ordinary cases of appeal, matters which do not strictly form a part of the record; and to these, and similar cases, I think our power to issue writs of *certiorari* is limited. My opinion is that the application should be denied.

Ordered accordingly.

WARNER *vs.* KELLY.

In this case the same doctrine is asserted as in the case of *Warner* v. *Hall*, (*ante*, *p.* 90.)

THE facts in this case are the same as in the case of *Warner* v. *Hall*, immediately preceding, and the application for the writ was made and argued at the same time as in that case.

Allen T. Wilson, for the application.

By the Court, BENNETT, J. This case depends upon the same principles which were laid down in *Warner* v. *Hall*, (*ante*, *p*. 90,) and the ruling must be the same.

SANTILLAN *vs*. MOSES.

If improper evidence is permitted to be given to the jury, a new trial will be granted, unless the court can see that such evidence could have had no influence upon the verdict.

It seems that, in the year 1833 or 1834, the property of the *Missions* in California was confiscated by the Mexican government, with the exception of limited portions reserved for religious purposes; and that, in carrying into execution this law of confiscation, the officers of the Mexican government took possession of the lands and property of the *Mission Dolores*, except a small portion reserved.

Where incompetent evidence was given, which might have had an influence on the minds of the jury in determining whether certain premises in dispute were included within that portion of the *Mission Dolores* which was claimed to have been confiscated, or that portion which was said to have been reserved; *Held*, that a new trial should be granted on the ground of the admission of improper testimony.

The position of the priest of the *Mission Dolores* being analogous to that of a sole corporation in England, he may, in his character of priest, maintain an action in his own name to recover possession of lands of the *Mission* which have been reserved.

APPEAL from the court of First Instance of the district of San Francisco. The plaintiff was the Catholic priest of the *Mission Dolores*, and the premises in controversy constituted a part of what was formerly known as *Mission* land; but the evidence was very uncertain and unsatisfactory upon the question whether the premises were within that portion of the *Mission* property which had been confiscated by the Mexican government, or that portion reserved for the uses of religion. The plaintiff claimed that, being the priest of the *Mission*, he was entitled to possession of the reserved *Mission* property. The only claim which the defendant set up to the land was that he

was in actual possession. The cause was tried before a jury, who found a verdict in favor of the plaintiff, upon which judgment was entered by the court. The defendant thereupon appealed. A bill of exceptions was returned with the record, which set forth the testimony and the exceptions, but in some one of the numerous fires which have occurred in San Francisco it has been lost, and the reporter cannot state what the improper evidence was, by reason of which the judgment was reversed. The cause was argued by

Wilson Shannon, for the plaintiff, and

James C. Holmes, for the defendant.

By the Court, BENNETT, J. The question in this case is upon the right to the possession of the premises in dispute. The plaintiff claims possession, by reason of his being the priest of the *Mission Dolores*. The defendant denies the right of the plaintiff, and claims to hold by virtue of his being in the actual possession of the premises. This appears to be the substance of the issue.

Upon the trial, for the purpose of establishing the claim of the plaintiff, numerous questions were put to his witnesses, and excepted to by the defendant, many of which were improper, and the answers to some of which improper questions may have had, and probably did have, weight with the jury in forming their verdict. In such case the rule is, that, unless it can be seen that the illegal testimony could have had no influence upon the verdict, we ought to grant a new trial; and it is impossible to tell what weight the jury allowed to the testimony thus improperly elicited.

It would seem that, in the year 1833 or 1834, the property of the *Missions* in California was, with the exception of a portion reserved for the use of the priests and the purposes of religion, confiscated by the Mexican government, and that, in carrying out this law of confiscation, the officers of the government took possession of the lands and property of the *Mission Dolores*,

with the exception of a portion reserved for religious uses. The point in relation to which the evidence improperly admitted may have had an undue weight upon the minds of the jury, is whether the premises in dispute constitute a part of this reservation. If they do not, then, assuming that the confiscation took place as alleged and not denied on the argument, we see no ground upon which this action can be maintained. If they do, we think that the priest, in his character as priest, may maintain the action. The case of *Lineker* v. *Ayeshford* is inapplicable. In that case the plaintiff appeared upon the face of his own declaration to be but a *naked* agent, whereas, the priest appears to have the charge of the church property, or at least of some portions of it, coupled with an interest. His position seems to be more nearly analogous to that of a sole corporation in England, than to that of a naked agent, and the power to sue is an inseparable incident to such corporation. (1 *Blackstone Comm.* 475, 476.)

New trial granted, costs to abide the event.

STEVENS *vs.* ROSS.

Under the practice act of 1850, the defendant may file his answer at any time before final judgment, notwithstanding his default for not answering may have been entered, with the same force and effect as if the answer had been put in before judgment by default against him.

It is irregular to entertain an *ex parte* motion to take the defendant's answer off the files, without proof that a copy of the affidavit on which the motion is founded, together with notice of the motion, has been served on the defendant's attorney a reasonable time before making the motion.

There may be error in a judgment by default as well as in a judgment rendered upon issue joined in the pleadings, and tried by a jury; and in the former as well as the latter case, the error may be corrected on appeal.

The statute having declared that the defendant "may file his answer at any time before the judgment is made final," *Held*, that it was not a matter resting in the discretion of the district court whether he should be permitted to file an answer after default but before final judgment.

This court is authorised by statute to render such judgment as substantial justice

shall require; but by this is intended substantial *legal* justice, ascertained and determined by fixed rules and positive statutes, and not the abstract and varying notions of equity entertained by each individual.

Appeal from the district court of the district of San Francisco. The facts upon which the judgment of the court is based, are stated in the opinion of the court. The cause was argued by

Hall McAllister, for the plaintiff, and

John S. Hagar, for defendant.

By the Court, Bennett, J. Suit on a promissory note. The complaint was filed in the court of First Instance of the district of San Francisco, on the 16th day of April last. The summons was returnable on the 22d, and an answer was filed on the 24th day of April. The proceedings were transferred into the district court under the act of Feb. 28th, 1850, previous to the filing of the answer. On the 27th day of April, the plaintiff's attorney presented an affidavit made by himself to the district court, setting forth that there had been no appearance on the part of the defendant, and no answer filed on the return day of the summons, and that as deponent was about proceeding to the court house, on such return day, for the purpose of entering up judgment by default, he was met by the defendant, who stated to him that he had no defence to make to the action, that the debt was justly due and owing, and that, in order to save further expense, if the plaintiff would not enter up judgment before the 25th day of April, he would pay the sum due on that day—that defendant had since admitted that he had directed his attorney to appear and plead, for the purpose of obtaining a further delay in making payment. Upon the facts presented by this affidavit, the court awarded judgment for the amount claimed by the plaintiff, and ordered the judgment to be entered *nunc pro tunc* as for the 22d day of April. Upon this judgment an appeal is brought.

Section 29 of the act of Feb. 28, 1850, provides for the trans-

fer of causes pending in courts of First Instance into the district courts upon their organization; and sec. 33 requires the district court into which any such suit shall be transferred, to proceed to hear, try, and determine it, "in the same manner, with like "effect, and subject to the same provisions of law" as if such suit had been originally commenced in the district court. This cause is one of the class provided for in these sections, and is, therefore, to be controlled by the provisions of the statute defining the practice of the district courts. That practice is laid down in the act to regulate proceedings in civil cases, &c., approved April 22, 1850. By section 125 of this act, if the defendant fails to appear and file his answer within a certain time after service of the summons, the plaintiff may take judgment by default against him; by sec. 127, the default can be entered only in open court; and by sec. 128, if, within three days after the default has been entered, the defendant neither appears nor files his answer, the judgment by default may be made final upon *proof* by the plaintiff of his demand. Section 130 then declares that "If the defendant, before or on the day when final "judgment was to have been rendered against him, appear and "file his answer, the judgment, if taken, shall be set aside, and "he may file an answer at any time before the judgment is "made final." From the above sections of the statute, it appears that, notwithstanding the 24th and 39th sections require the answer to be filed within a limited time after service of the summons, the defendant may yet put in an answer at any time before final judgment, even after his default has been entered, and without application to the court for that purpose. It does not appear from the record before us that the default of the defendant was, at any time, entered; and he had three days after his default should be entered to file his answer. There can be no pretence that the default was taken until the 27th day of April, and before that day the answer of the defendant had been filed. The answer, therefore, was put in in time; an issue of fact was joined; and the practice, in proceeding to trial and judgment, should have been as laid down in the act of April 22.

It was claimed on the argument that the action of the court

was equivalent to ordering the answer off the files, or setting it aside, on the ground of the deception practiced upon the plaintiff's attorney, as detailed in his affidavit. Without intending to question the power of the court to do this, no motion to that effect should have been entertained without proof that a copy of the affidavit on which such motion would be founded, together with notice of the motion, had been served a reasonable time on the defendant's attorney, in order that he might have an opportunity of coming in with counter affidavits and opposing the motion. No notice of the motion appears to have been given, and the proceeding ought not to be sustained, if regarded as an order of the court setting aside the answer.

The respondent says that this is a judgment by default, and that an appeal will not lie. Though it were a judgment by default, it is none the less a final judgment, and an appeal is given by the statute. There may be error in a judgment by default as well as in a judgment rendered upon issue joined in the pleadings and tried by a jury; and in the former as well as in the latter case, the error may be corrected on appeal.

Again it is said, that the dismissal of the answer was an interlocutory proceeding, resting in the discretion of the court. We think, however, where a statute prescribes unequivocally the rights of a party in the course of a judicial proceeding, the court has no discretion to deprive him of those rights. The statute says, the defendant "may file an answer at any time "before judgment is made final." The court cannot say, in its discretion, whether he may or may not have the full benefit of this clause, without at least affording him an opportunity of being heard upon the point. The positive rule is written in the statute, and there is no room for the exercise of discretion. As to the decision of the court being an interlocutory order, section 279 of the statute above cited, requires us to review such an order when it involves the merits and necessarily affects the judgment; and an order striking out an answer, regularly put on file, and rendering judgment without trial, appears to us to fall within this class.

But it is further said that the supreme court is authorized to

render such judgment as substantial justice shall require. Substantial justice requires that both parties should be allowed a hearing, and a denial of that can scarcely be termed a formal or technical error, defect, or imperfection. It strikes us very forcibly that the defendant has no defence on the merits in this action—but whether he has, or has not, is a question which can not be tried here—a question, which the defendant is entitled to have passed upon in another way, and before a different forum; and if the practice contended for by the respondent were to be sanctioned in the present instance, it would become the rule for the government of subsequent cases in which it might appear clear to us that there was a good defence. The substantial justice spoken of in the statute, is substantial *legal* justice, to be ascertained and determined by fixed rules and positive statutes, and not the abstract and varying notions of equity which may be entertained by each individual.

A new trial is granted, costs to abide the event.

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2 Cal. R. 51.
10 Inc. 260

Harris *vs.* Brown.

A mere parol agreement for the conveyance of land made before the adoption of the common law and the re-enactment of the statute of frauds in this state, is void, there being neither delivery of possession, nor of title deeds, and no part payment of the purchase money.

A., the owner of a lot of land in San Francisco, requested B. to sell the same, and delivered to him the title deeds in order to enable him to effect a sale: B. agreed verbally with the plaintiff to sell the land to him, but A. refused to comply with the verbal agreement which B. his agent had made with the plaintiff: *Held*, in an action by the plaintiff against A. to compel the execution of a deed, or the payment of damages, that the agreement was void, and could not be enforced, and that the defendant A. was not liable in damages.

Appeal from the court of First Instance of the district of San Francisco. The defendant, being the owner of a lot of land in San Francisco, and being desirous of selling it, engaged one Stephen Harris to sell it, but gave him no other than a verbal authority, except that he delivered to him the title deeds. On

the fifth day of December, 1849, the agent contracted with the plaintiff to sell the lot to him for $6,500, but this contract was not in writing, nor were the title deeds or the possession of the land delivered by the agent to the plaintiff. The whole matter rested solely in parol. On the next day the defendant, not having been informed of the sale by his agent, conveyed the land to another person for the sum of $6000, and on being informed in the evening of the same day of the sale effected by his agent, he replied that he regretted he had not known of it in time. Subsequently to the sale by the agent the plaintiff tendered the purchase money to the agent and also to the defendant, who refused to accept it and give a deed on the ground that in ignorance of the sale by his agent, he had sold the land to another person, and had given him a deed therefor. The defendant had, in fact, sold the land and given a deed, as he stated. It was proved that the lot was worth eight or nine thousand dollars; and witnesses expressed their opinions, that if judiciously cut up into building lots it might have been sold in a short time for from sixteen to twenty thousand dollars. The cause was tried before the judge of First Instance without a jury, on the 28th day of December, 1849, and a decree was entered "that defendant deed the property in dispute to plaintiff on or "before Monday, or pay him $1,500, at which time the judge "will hear defendant's argument." On the 31st day of December, 1849, a further judgment was entered as follows: "Now "at this day, the court, after hearing defendant's argument, "confirms the former judgment. It is therefore considered by "the court that the said plaintiff recover of the said defendant "the said sum of $1,500, together with the costs and charges "in this behalf expended, and that he have execution therefor."

From this judgment the defendant appealed.

Alexander Campbell, for the plaintiff. The judgment is sustained by the evidence. It is not necessary that contracts relating to land should be in writing. No statute to that effect can be shown to have existed in California at the time of the conquest; and from the condition of the people and their great

ignorance it is highly improbable that the principle of the statute of frauds was ever adopted here.

Alexander Wells, for the defendant.

By the Court, HASTINGS, Ch. J. It appears that the respondent made a contract of purchase of a certain city lot in San Francisco of one Stephen Harris, as the agent of Brown the appellant, which contract was not reduced to writing nor any memorandum thereof.

That said Stephen Harris held only the title papers as evidence of his agency and did not have any written authority to sell. That no purchase money was paid nor possession taken. That appellant had sold the same property to another person before the sale, or at least notice of the sale. The court of First Instance rendered judgment against the appellant in the sum of $1,500. Respondent's counsel holds that inasmuch as there was no statute of frauds in force in California at the time, the contract was valid. We are unable to perceive how, under any system of laws, a verbal understanding between an agent, unauthorized by any written paper, and a vendee who neither takes possession nor pays any part of the purchase money, can be enforced if repudiated by the vendor; and even if such a contract could be holden valid, it would seem to have been the duty of the vendee, under the circumstances, to have immediately notified the vendor of his purchase.

The possession of the property was in the vendor, and before the vendee could claim the property as his by a valid purchase, he should have taken possession either by actual *seisin* under the contract or by title papers duly executed.

We cannot perceive by what rules of equity the court below rendered a judgment for $1,500 in favor of respondent.

There seems to be not the shadow of equity in the respondent's case.

The judgment, therefore, of the court below, is reversed.

Reed vs. Jourdain et al.

Where nothing appears on the record, either in the pleadings, evidence, or judgment, from which this court can ascertain the rights of the parties, and where, from what does appear, it is highly probable that the judgment of the court below is founded neither upon law nor equity; *held*, that the judgment appealed from should be reversed under the provision of the statute, which declares that this court, "when "from the character of the record no tangible point is presented for determination, "may remand the cause for new trial."

Appeal from the court of First Instance of the district of San José. This was one of that numerous class of cases, in which Alcaldes and judges of First Instance assumed the power to turn people out of the possession of real estate, without citation, notice, or hearing, upon the *ex parte* application and statement of persons who never had either possession or title. The facts, so far as they can be gathered from the return on appeal, are to be found in the opinion of the court. Judgment was rendered in the court of First Instance against the defendants.

———, for plaintiff.

J. M. Jones, for defendants.

By the Court, Hastings, Ch. J. The respondent on the first day of September, A.D. 1849, caused a citation to be issued, as is contended, to the appellants, which was returned "executed," demanding redress against them as trespassers on a certain piece of ground in the Pueblo de San José.

On the 8th day of September, the court rendered the following sentence:—"It appearing from the documents of the parties that his (the said Reed) complaint is based on recorded "original papers, therefore the said Jourdain & Phister must "desist from further trespassing on said lands and tenements in "said Pueblo de San José; and the said James F. Reed is

" hereby put fully in possession of the said property described, " and to be found on record, and conveyed by Manuel Pinto to " said Reed."

It appears that the appellants protested against the decision as contrary to law, and appealed to John T. Richardson, judge of First Instance of said district, for redress, before whom affidavits were made, and testimony taken, and proceedings had in the nature of perpetuating the testimony of witnesses, and much other confusion ensued.

The 26th section of the act of February 28th, 1850, provides, that when from the character of the record no tangible point is presented for determination, this court may remand the cause for new trial in the court below. However regular these proceedings may have been at the time, as merely summary under the law then in force, on the part of the respondent, yet it evidently appears that the appellants ought to have been heard, and should have had a trial. For some cause it seems there was no trial. The sentence was pronounced not upon proof of the actual possession of respondent, but upon "*recorded original papers.*" What was the nature of those "recorded original papers," the record does not show. They may have imparted title to the respondent or not. No tangible point is presented by this record upon which this court can act, and no injustice can be done by awarding a new trial. We are, therefore, of the opinion that the sentence of the court should be reversed, and that the respondent should be permitted to file in the district court of the proper district his complaint, and the appellants their answer, and an issue made up and tried in the same manner as if no proceedings had hitherto been had, and the costs to abide the event of the suit.

SELBY *et al.* *vs.* THE BARK ALICE TARLTON *et al.*

A district court has no authority to allow counsel fees in a cause transferred from the court of First Instance into that court by the statute of Feb. 28th, 1850. Thus in such a case, where counsel fees were allowed to the defendant to the amount of $600, the judgment was reversed.

APPEAL from the district court of the district of San Francisco. The action was commenced in the court of First Instance and was transferred into the district court, upon the organization thereof, by virtue of the provisions of the statute of Feb. 28th, 1850. The suit was brought against the bark *Alice Tarlton* and master to recover damages for injuries to goods on board the *Alice Tarlton* on her passage from New York to San Francisco, and not delivering them in good order. The complaint was in the form of a libel in admiralty, and the proceedings in the court of First Instance were the same as in a court of admiralty. Upon the cause being transferred to the district court, the judge thereof, supposing that he had the same liberal discretion in the allowance of counsel fees, which is exercised by courts of admiralty, in addition to a judgment in favor of the defendants for the regular costs, ordered judgment to be entered in their favor for $600 counsel fees. From this judgment the plaintiffs appealed.

E. Temple Emmett, for plaintiffs.

John S. Hagar, for defendants.

By the Court, BENNETT, J. Conceding that the court of First Instance had admiralty powers and jurisdiction under the laws in force when this suit was commenced, and that it might have allowed the counsel fee which was allowed by the district court, it by no means follows that the latter court had the same extent of authority in this respect as the former. Whatever

may have been the powers and jurisdiction of courts of First Instance, it is clear that the district courts have none beyond what has been conferred upon them by the statutes of this state. The legislature, in adopting the common law, by the act organizing the district courts and by the act prescribing the practice therein, have defined the limits of the powers and jurisdiction of district courts; and I do not find in either of those acts any thing which countenances the idea that the legislature has vested the district courts with the powers of a court of admiralty, or has authorized them to allow a counsel fee, in addition to the regular taxable costs, on the dismissal of a complaint.

The judgment, therefore, to the extent of the regular taxed bill of costs should be affirmed; and as to the counsel fee of $600, it must be reversed.

Ordered accordingly.

SUBLETTE *vs.* MELHADO.

Where an attachment was issued by the court of First Instance against the property of a debtor, and the sheriff had executed the same, and was ordered to make the amount due the creditor out of the goods, chattels, and property of the debtor; *held*, that the sheriff could not maintain an action in his own name to recover a sum owing to the attachment debtor by a third person, for goods sold and delivered.

APPEAL from the court of First Instance of the district of San Francisco. On the application of Swanston & Taylor, an attachment was issued against the property of George S. and Thomas Wardle, and was executed by the plaintiff, who was the sheriff, or *commissario*, of the court of First Instance. The court, thereupon, made an order by which the plaintiff was directed to proceed under said attachment, and of the goods, chattels, and property of the Wardles, to make the amount which had been found and adjudged to be due from the Wardles to Swanston & Taylor. The defendant, Melhado, was indebted to

the Wardles in the sum of $1600, or thereabouts, to the greater part of which amount he claimed to have a set-off. The plaintiff, proceeding under the above-mentioned order of the court, brought this suit to recover the sum due from Melhado to the Wardles. The court of First Instance, on the trial of the cause, allowed the amount of Melhado's set-off against the Wardles in part extinguishment of his indebtedness to them, and gave judgment in favor of the plaintiff for the balance. The plaintiff, claiming that the set-off was improperly allowed, appealed. The defendant did not appeal.

Edward Norton, for plaintiff.

P. A. Morse, for defendant.

By the Court, Hastings, Ch. J. Andrew W. Sublette, the late sheriff of said court, institutes this action against Alfred Melhado, a debtor to George S. Wardle and Thomas Wardle, against whom process of attachment had been issued in favor of Robert S. Swanston and Henry S. Taylor. The action is based upon the supposed rights of the sheriff, by virtue of the service of the attachment upon the property and effects of the defendants in the attachment, and that, by virtue of such service, he became the assignee of the Wardles, and thus had the right to recover in his own name an outstanding unnegotiable demand. The process of attachment, and its auxiliary process of commitment, are generally regulated by statute; and it is believed, by no statute in any country, is the sheriff made, by virtue of such process, an assignee of a failing or bankrupt debtor. It is evident, then, that Sublette had not the right of property in the debt, and could not maintain an action in his own name for the recovery of such a debt. If the appellant had been an assignee, having the legal interest, as seems to have been understood by all of the parties from the commencement of these proceedings, then the points made by his counsel would have a tendency to show error in the court below, in allowing the credit specified

in the record, and we should probably feel bound to reverse the decision of the court allowing such a credit.

It is urged, however, by counsel for appellant, that the respondent by his pleadings admitted the legal right of the appellant to sue in the capacity of an assignee, inasmuch as he did not set up such defence on trial, but admitted a willingness to pay a certain balance after allowance of the credit. It is true parties may sometimes, in ignorance of the law, make confessions of record prejudicial to their rights. But courts should put at least a favorable construction upon such admissions, and not force them to a greater admission than is clearly intended.

The respondent denies the right of appellant to recover the amount of the credit allowed, but admits the right to the balance, for which judgment was rendered by the court.

But is it not evident that, had the appellant recovered for the full amount claimed, the respondent could have succeeded on motion in arrest of judgment, for reason that there was no right of action in the plaintiff?

We think, according to the rules of practice in courts of common law, that the defect would have been fatal on motion in arrest: (*Stephen's Pleadings*, 97.)

It does not appear, therefore, that the court below erred in refusing to render judgment for the full amount claimed; and inasmuch as the respondent has not appealed from the decision of the court, but seems to acquiesce therein, the judgment is affirmed.

THE PEOPLE *vs.* DANIELS.

A court of First Instance had no authority under Mexican law to pronounce sentence of death upon a prisoner convicted of a capital offense. In such case, the proceedings were to be sent up to the court of Second Instance, in which court alone could final judgment be rendered. *Per* BENNETT, J.

Where judgment of death had been rendered against a prisoner by the court of First Instance, it was reversed in this court, as well on the ground above stated, as also

that numerous errors and irregularities appeared to have occurred in the progress of the proceedings, which resulted in the conviction of the prisoner.

APPEAL from the court of First Instance of the district of San Francisco. This case not being deemed of importance as a precedent, a detailed statement of the proceedings in the court below is omitted. It is sufficient barely to state that the defendant was tried before a jury for the crime of murder and was convicted, and that final judgment of death was rendered against him by the court of First Instance. The evidence was not returned to this court.

J. B. Hart, district attorney, for the people.

Alexander Campbell, for the prisoner.

By the Court, HASTINGS, Ch. J. On the 30th day of August, A.D. 1849, a grand jury empannelled by John W. Geary, Esq., sitting as judge of the court of First Instance in the district of San Francisco, territory of Upper California, presented a bill of indictment against the defendant for the crime of murder.

It will be unnecessary to enter into a detail of the proceedings in this case, from the fact that the laws of the country then in force were but imperfectly understood and error and irregularity are found in all of the proceedings of the courts, especially in criminal cases. The errors in this record are so numerous that the execution of the defendant would not be the judgment of the law, but the mere will of the court and executioner. We therefore think the defendant ought again to be put upon his trial upon an indictment presented by a regular grand jury, and that the defendant be held in custody to abide the order of the district court.

Ordered accordingly.

BENNETT, J. I rest my judgment in this case solely on the ground that the court of First Instance had no legal authority to render final judgment. Under the Mexican decrees, though

proceedings in capital cases may be instituted in the court of First Instance, and testimony taken and a trial had in that court, yet the papers must always be sent up to the court of Second Instance, where, only, final judgment could be rendered. The court of Second Instance has ceased to exist, and the business pending therein has been transferred into this court by the act of Feb. 28th, 1850. So far as the present case is concerned, this court should treat it in the same way as the court of Second Instance would have treated it, had that tribunal still continued in existence; and that court would have pronounced judgment of death, if it clearly appeared on the papers sent up to it, that the prisoner was guilty: if his guilt did not clearly appear, it would have rendered judgment of acquittal or remanded the cause for farther proceedings, or admitted additional evidence, according to circumstances. There is nothing in the papers which have been returned to this court, which induces the conviction in my mind, beyond a reasonable doubt, that the prisoner is guilty. I think, therefore, that the cause should be remanded to the district court for a new trial.

RINGGOLD *vs.* HAVEN & LIVINGSTON.

On appeal, under the Act of Feb. 28th, 1850, the decisions of the court of First Instance during the progress of the trial are reviewable, although no exception was taken at the time, and no bill of exceptions has ever been made.

The court may order the plaintiff to be non-suited against his consent.

Where the evidence would not authorize a jury to find a verdict for the plaintiff, or if the court would set it aside, if so found, as contrary to evidence, in such case it is the duty of the court to nonsuit the plaintiff.

The practice of nonsuit and of demurrer to evidence considered. *Per* BENNETT, J.

Where a cause comes up on appeal, on the record alone, properly so considered, without purporting to contain any of the testimony on the trial, the court will presume that sufficient testimony was given to warrant the judgment. *Per* BENNETT, J.

Where an exception is taken to the decision of a court refusing a nonsuit, it devolves upon the plaintiff, on the settlement of the bill, to see that all the evidence material for him in sustaining the decision complained of, is inserted in the bill of exceptions.

If there be some evidence which tends or conduces to prove *all* the material allegations of the complaint, the sufficiency thereof is a question for the jury: but where there is *no evidence on some material point* necessary to be proved in order to make out a cause of action, it becomes the duty of the court, on motion of the defendant, to order a nonsuit.

An action was brought against the defendants to recover damages for injuries to goods in being carried from New York to San Francisco, founded not upon contract, but upon the common law *duty* of carriers; *Held*, that it was necessary for the plaintiff to establish, not only the delivery of the goods to the defendants, but that they were engaged in the business of transporting goods *as common carriers;* and there being no evidence whatever that the defendants were common carriers; *Held*, also, that a motion for a nonsuit should have been granted by the court below.

Where a defendant moved for a nonsuit, and afterwards introduced evidence supplying the defect in the plaintiff's testimony on which the motion for nonsuit was founded; *Held*, that the defendant had thereby waived his motion, and could not insist upon it in this court.

In an action against a common carrier, the rule of damages is the value of the goods at the port of delivery, and not the invoice price or the value at the port of shipment.

APPEAL from the court of First Instance of the district of San Francisco. The facts are fully stated in the opinion of the court.

McDougall, (attorney general,) for plaintiff.

E. Temple Emmett, for defendants.

By the Court, BENNETT, J. Appeal from judgment of the court of First Instance for the district of San Francisco. The action was brought against the defendants as common carriers for not safely transporting certain goods of the plaintiff from the port of New York to the port of San Francisco. The complaint was in the ordinary form of a common law declaration *in case* against a common carrier, and the plea was the general issue. At the trial the plaintiff himself was sworn as a witness by the consent of the defendants, and testified that sometime in the year 1849 he *consulted* Haven, one of the defendants, about the shipment of goods from New York to San Francisco; who informed him that goods shipped at the former port would arrive at the latter, in about sixty days after their shipment, and, at the same time, gave him a card, whereon were printed the names

of Livingston & Wells. The plaintiff, thereupon, wrote to New York directing his agent to send the goods in controversy in this suit to San Francisco by Livingston & Wells, to whom Haven had referred him. The freight for the transportation was paid to the defendants, but whether before shipment or after arrival of the goods, does not appear. The invoice price of the goods was $219,94, and their market value at San Francisco $2,700. On their arrival they were found to be much damaged from having been long immersed in water. Upon proof of these facts, the plaintiff rested his case, and the defendants moved for a nonsuit. The court, however, held, that the defendants, having made a contract with the plaintiff, without disclosing their principal, or giving notice that they were acting as agents, were liable in this action, and refused the nonsuit.

The defendants then gave in evidence a bill of lading, which was handed to them by the plaintiff, on his receiving from them the goods in question. The bill of lading was in the ordinary form, and was *signed by* "*Livingston, Wells & Co.,*" and by it, the articles therein mentioned were consigned to the plaintiff, to the "care of Haven & Livingston," San Francisco. The defendants then claimed, that the evidence furnished by the bill of lading was sufficient in law to bar the action against them, but the court held that a contract existed between the plaintiff and the defendants for the transportation of the goods, and that the defendants were liable in this action upon that contract. The defendants then contended that the measure of damages should be the price of the goods at the place of shipment, added to the expenses which the plaintiff had incurred, but the court was of opinion, that it would be more equitable to add the price at the place of shipment to the expenses of the plaintiff and the value of the articles at San Francisco, and divide the sum total by two. The defendants objected to this method of arriving at the amount of damages, but the court rendered judgment for the sum resulting from the equitable estimate above stated. The cause was tried without a jury; and the paper upon which the testimony and proceedings at the

trial appear in the record, is termed upon its face a bill of exceptions.

Under these proceedings, it is contended in this court by the counsel for the appellants; 1st, That the court below erred in not granting the nonsuit prayed for; 2d, That the bill of lading showed that the contract for the transportation of the articles mentioned therein was a contract between the plaintiff on the one side, and Livingston, Wells & Co. on the other, and not a contract to which the defendants were parties; 3d, That, even though a contract for the transportation of the goods in question between the plaintiff and the defendants were proved, there was yet no evidence to sustain the averment in the complaint that the defendants were common carriers, and that this action could not be maintained without establishing that position; and 4th, That the court erred in estimating the damages. The counsel for the respondent contends; 1st, That the paper containing the testimony and proceedings at the trial, must be regarded strictly as a bill of exceptions, and that it does not appear therefrom that any exception was taken to the ruling of the court; 2d, That the court below could not direct a compulsory nonsuit to be entered against the plaintiff; 3d, That the evidence tended or conduced to prove all the facts necessary to be established in order to warrant the judgment, and that a jury would have been, and the court sitting as a jury was, justified in finding such facts from the evidence returned; and 4th, That this court is bound to presume, in favor of the proceedings, that there was evidence given, though not returned, sufficient to warrant the finding of the court.

In considering these various points, it is proper, in the outset, to direct attention to the position of the counsel for the respondent, that the portion of the record, which purports to set forth the testimony and proceedings at the trial, is a bill of exceptions, and should be subjected to the rigorous rules of the common law practice as applied to bills of exceptions. If this position be tenable, we cannot, then, upon this appeal, review the decision of the court denying a nonsuit, for it does not ap-

pear that the defendants took a proper exception, on this ground, at the very time of the trial.

The judgment appealed from was rendered after the act of Feb. 28th, 1850, took effect. From that act we derive all the authority we have, to entertain an appeal, in any case, from a judgment of the court of First Instance, and it follows, therefore, that the only question to be determined, upon the point under consideration, is whether the proceedings upon this appeal are conformable to that act. This statute enjoins upon us to look at the substance of the proceedings at the trial, rather than to require a strict compliance with technicalities and forms in spreading those proceedings upon the record. In no portion of it, is a bill of exceptions spoken of, or alluded to, or in any way recognized. This omission is, we presume, not accidental. It is owing, no doubt, to the intention of the legislature to obviate the nice questions of practice, which frequently arise upon bills of exceptions, and which, in the condition of legal procedure then prevalent in our courts, might become the instruments of enabling a party to evade the real merits of an appeal. By section 18 of the statute above referred to, it is enacted, that "when an appeal shall be taken from any judgment "or order hereafter rendered or made, on the ground of error "in the proceedings at the trial, a *case* shall be prepared by "the appellant, containing such portion of the testimony, de- "cisions of the court and other proceedings, as shall be neces- "sary to present clearly to the appellate court the alleged "ground of error." The sections immediately succeeding, point out the mode in which the case shall be served, amended and settled, and section 22 requires the clerk to return such case upon appeal. The section last cited also declares, that if no case shall have been made by the parties, it shall be the duty of the *court below to make a return of the testimony and proceedings* at the trial. The statute provides these two modes, and these alone, for bringing before the appellate court, for review, the errors which may have occurred in the course of the trial. Whether, therefore, the portion of the record referred to, be a case made by the parties, or a statement of the proceed-

ings drawn up and returned by the court—whether it be denominated a bill of exceptions, in the terms of the common law, or an authenticated copy of the record, in the language of the civil law,—we are to look at the substance of its contents, and to disregard its imperfections in form; and viewing it in this manner, we see that the defendants moved for a nonsuit, and that the court denied the motion—that after their evidence was closed, they insisted that it was sufficient to bar the action, and that the court decided otherwise. It is a matter of no account, whether they *excepted* to the ruling of the court or not; or if they did *except*, whether the *exception* appears upon the record.

We are now ready to consider the questions; 1st, Had the court the legal right to order the plaintiff to be nonsuited without his consent? and 2d, If so, did the court err in refusing to grant the motion for a nonsuit in this case?

First, As to the right of the court to direct a compulsory nonsuit. Upon this point, we are met by a contrariety of authorities and a diversity of argument. In some of the states, the affirmative, in others the negative, of the proposition is asserted in theory and maintained in practice. In some, it is held, that the court has no right, in any case, to nonsuit the plaintiff, even though his evidence be insufficient in law to support his action; whilst, in others, it is settled, that a jury should be allowed to receive no cause until the court is satisfied that the evidence is sufficient *in law* to authorize the jury to find a verdict in favor of the plaintiff. In all, however, it is agreed, that cases may, sometimes, under certain forms, be withdrawn from the jury and reserved for the sole consideration and determination of the court. This last is a common ground in the English courts, in the federal courts of the Union, and in the courts of the various states. The only difference upon the subject which appears to exist, is as to the manner in which the conceded end shall be reached. In the federal courts, and in the courts of some of the states, the object is attained by means of the cumbrous and complicated machinery of a demurrer to evidence; in the courts of others of the states, through the simpler and easier pro-

cess of motion for non-suit at the trial. In both cases, the same end is arrived at; and the one remedy as well as the other can be applied only where the plaintiff shall have failed to make out a case which the law says is proper to be submitted to a jury. The former practice is constantly passing more and more into disfavor, and the latter usurping its place. Thus, at the present day, in the English courts, although it is held, in theory, to be optional with the plaintiff whether he will be nonsuited or not, and that he may compel the defendant to resort to a demurrer to evidence, yet the constant practice there is for the plaintiff, upon the suggestion of the judge that the evidence is insufficient, to submit to a nonsuit, with leave to move the court in bank to set it aside. (*Graham's Pr.* 270.) In the state of New York the practice of compulsory nonsuit is perfectly well settled. (*Clements* v. *Benjamin*, 12 *J. R.* 298; *Pratt* v. *Hull*, 13 *id.* 334; *Stuart* v. *Simpson*, 1 *Wend.* 376; *Betts* v. *Jackson*, 6 *Wend.* 173.) The reasoning of the court upon this subject in *Pratt* v. *Hull* is convincing: "The answer to this abstract question," they say, "cannot ad-"mit of a doubt. This must be a power vested in the court. "It results necessarily from their being made the judges of the "law of the case where no facts are in dispute. It is a pure "question of law, whether under a given state of facts, the "plaintiff is in law entitled to recover. Unless this is a ques-"tion of law for the courts, there is no meaning in what has "been considered a salutary rule in our courts of justice, that "to questions of law the judges are to respond, and to questions "of fact the jury." The general rule is well laid down in *Stuart* v. *Simpson* above cited, as follows: "If the evidence "would not authorize a jury to find a verdict for the plaintiff, "or if the court would set it aside, if so found, as contrary to "evidence, in such case it is the duty of the court to nonsuit "the plaintiff." The power of a court, acting according to the course of the common law, to set aside a verdict, which is contrary to, or unsustained by, the evidence, is too clear to admit of a doubt; and the power of a civil law court of Second Instance to reverse the judgment of a court of First Instance, on

the ground that it is against the weight of evidence, is also unquestionable. If, therefore, upon a given state of facts, a court would be obliged to set aside a verdict of the jury as against the evidence, we see no reason or propriety in submitting such facts to them for their consideration. When their determination will be a nullity, why compel them to deliberate? Such a course is neither creditable to the law, nor complimentary to the jury. Nor, in adopting the practice of nonsuit, is there to be apprehended any danger of encroachment upon the rights of parties, or of abridgement of the prerogatives of juries. This system of trial can be expected to operate beneficially, and with certain, not fickle, results, only when the practical sense of a jury is guided by, and acts in subserviency to, established principles of law, expounded and enforced by the court. We are of the opinion, therefore, that the power of compulsory nonsuit should be upheld.

Secondly; Did the court err in refusing to grant the motion for a nonsuit in this particular case? The counsel for the appellants claims, that it should have been granted, on the ground that there was no evidence given, upon which the law would permit a jury to find the truth of the two material averments in the complaint, that the defendants were common carriers, and that the goods in controversy were delivered to, and received by them, as such. The counsel for the respondent endeavors to support the ruling of the court by the positions, that there was some evidence tending or conducing to prove each of these allegations, and that the sufficiency of such evidence was a question solely for the decision of the judge, as it would have been for the determination of a jury, had a jury been called; and further, that, even though the testimony returned with the record be insufficient in law to uphold the refusal of the nonsuit, an appellate court must presume, that the entire evidence given by the plaintiff would justify the ruling of the court, and that only a portion thereof is returned.

The last position we shall examine first. The doctrine of presumption asserted, undoubtedly applies when a case comes up on the naked record without any attempt to return the tes-

timony. Such was the case of *Gonzales* v. *Huntley*, decided at the March term of this court. The same rule is applicable, commonly though not universally, to a strict bill of exceptions; of which it is not the office to return the testimony farther than is essential to explain, and give point to the particular exceptions reserved. But it is not properly applicable to what is denominated a *case*, the very scope and object of which is, to bring up the entire testimony and proceedings which may be deemed of importance by either party. The presumption here is, that all material things are embodied in the case. The latter presumption also arises even upon a bill of exceptions, where the exception taken is to the decision of the court refusing a nonsuit. In such event, it is the business of the plaintiff, upon the settlement of the bill, to see that all the evidence, material for him in sustaining the decision complained of, is spread upon the record.

The other position of the counsel for the respondent is, when slightly modified, correct; if there be some evidence, which, in legal construction, fairly tends or conduces to prove *all* the material allegations of the complaint, the sufficiency thereof is a question solely for the consideration of the jury. But here the rule stops. And, therefore, whilst it is conceded, that where the evidence is conflicting, or doubtful, or even slight, it is proper that it should be left to the jury to pass upon, yet, at the same time, where there is *no evidence upon some material point* necessary to be proved in order to sustain the complaint, equally as where there is no evidence at all upon *any point*, it becomes the duty of the court, upon the motion of the defendant, to order a nonsuit.

Let us now apply the principles above laid down to the case at bar. To sustain the complaint, it was indispensable for the plaintiff to establish, in addition to other matters, the two material averments that the defendants were common carriers, and that the goods in question were delivered to, and received by them, as such, for the purpose of being transported, for hire, from New York to San Francisco. Proof of these averments would have obviated the necessity of showing any other or fur-

ther contract between the parties; for, the action is founded upon the common law *duty* imposed upon *common carriers*, and sounds, not in contract, but in tort. It follows, that, though there may exist an express contract, in a suit upon which the defendants would be liable according to its terms, it cannot be enforced under this complaint, without proving both the character of the defendants and the delivery of the goods.

The sole evidence offered by the plaintiff of the delivery, consists in the statement in the record, "that the plaintiff gave in "evidence the market value of said goods in San Francisco and "the amount of damage sustained, as appears by being long "immersed in water." Whether this be evidence from which a jury might legitimately infer that the property was ever delivered to the defendants, it is unnecessary to determine; for the reason, that the defendants themselves, by their own evidence, showing the possession of the goods at one time in the defendants, supplied this defect in the plaintiff's case. This ground of nonsuit was, therefore, waived by the defendants at the trial. But after an attentive and careful perusal of the whole record, we cannot find a *scintilla* of evidence bearing, in any way, upon the point whether the defendants stand in the position of common carriers. This, however, is an affirmative fact, which the plaintiff was bound to make out; and there being no evidence upon it, a verdict of the jury finding it to be true, could not be upheld by the court. The motion for a nonsuit should, therefore, have been granted.

We have thought proper to consider, somewhat at length, the practice of nonsuit, as it is a subject upon which it may be of interest to the profession to procure an early knowledge of the views of the court. Inasmuch, however, as a new trial is to be had, it is expedient that the cause should then be finally disposed of, and, for this reason, we shall proceed to give our views of the other points made by counsel.

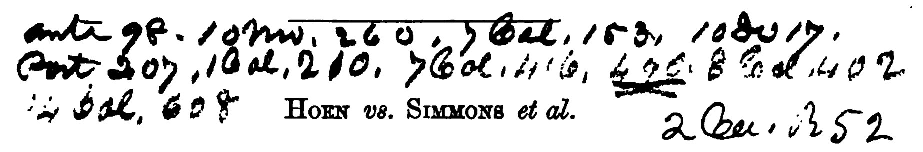
The testimony of the defendants, taken in connection with that of the plaintiff, shows that the court below erred upon the whole case. The plaintiff himself testifies, that when he applied to Haven concerning the transportation of the articles in suit,

Haven gave him a card whereon were printed the names of *Livingston & Wells*, and that the plaintiff directed his agent in New York to send the goods to San Francisco by *Livingston & Wells, to whom Haven had referred him.* The bill of lading, under which the goods were forwarded, is signed by *Livingston, Wells & Co.*, and consigns the contents to the plaintiff, *to the care of Haven & Livingston, San Francisco.* It thus appears that *Livingston, Wells & Co.* were the *carriers*, and that all Haven & Livingston had to do with the matter was to receive the goods, at this end of the line, as agents or warehousemen. The fact that the freight was paid to them is, in no wise, inconsistent with the fact of their being simply agents in the transaction. In this view of the case, the only ground upon which *this* action can be maintained against the defendants, is by proving that Livingston, of the firm of Haven & Livingston, is the same person as Livingston, of the firm of Livingston, Wells & Co.; or that the former firm, were partners, or that one member thereof was a partner, in the latter firm.

The sole remaining question is as to the proper rule for estimating the damages; in other words, whether the price of the goods at the place of shipment, or the value thereof at the port of delivery, should be adopted as the criterion for determining the amount of the recovery. Upon this point the authorities do not coincide—some jurists of eminent ability holding the price at the place of shipment to be the limit, or as the case may be, the extent, of damages, which the plaintiff is entitled to recover—but we are of opinion that the weight of authority, as well as the reason of the thing, is in favor of making the value of the goods at the port of delivery the rule for determining the amount of damages. (See *Sedgwick on Das.* 370.) The shipping contract requires the carrier to transport the cargo safely, and deliver it at the *terminus* agreed upon; in case of non-fulfilment, the principles of law would dictate, that he ought to be responsible to the other party for an amount which would cover the actual damage sustained. That amount is the market value of the goods at the port of delivery; for, if the contract had been fulfilled, the shipper would have realized that sum,

and that sum only. This is the damage strictly and necessarily resulting from the breach of the contract, and an estimate upon this basis seems to be more in unison with the rules for computing damages in most other cases, than the conflicting rule referred to.

New trial granted, costs to abide the event.



HOEN *vs.* SIMMONS *et al.*

In an action for the recovery of land, if the plaintiff proves no title, the defendants being in possession cannot be ousted; but if the defendants have entered into possession, claiming under the plaintiff, and in subordination to his title, they are estopped from questioning it.

A specific performance of a contract for the conveyance of land, can be enforced only when the contract is in writing, or where there has been part performance of a verbal contract by the vendee.

Where the terms of a verbal contract are reduced to writing, but the written paper is neither signed nor delivered, the contract will be deemed inchoate and incomplete, and neither party will be bound by it.

A party who seeks a specific performance of a verbal contract for the conveyance of real estate, should show that he has fully complied with the *substance* of the contract on his part.

Thus, where A. contracted verbally to convey to B. a certain lot of land for $5000, of which sum $1000 was to be paid down, and the balance in two months, with interest at the rate of two per cent. a month, and the time for the payment of the $4000 had elapsed long before the commencement of the suit; *Held*, the plaintiff not having paid or tendered the $4000, with interest, that a specific performance ought not to be decreed.

An agreement for the conveyance of land, resting solely in parol, is void by the Mexican law.

APPEAL from the court of First Instance of the district of San Francisco. The action was brought to recover possession of a lot of land in the city of San Francisco. The plaintiff had made a verbal contract with the defendants to sell to them the premises in controversy for the sum of $5000, of which $1000 was to be paid down, and the balance in two months, with interest at the rate of two per cent. a month. It was understood by the

parties that the contract was to be reduced to writing, and signed by them; papers were accordingly drawn up by the defendants' attorney, but before they were signed the plaintiff left the state for Oregon, and they never were signed. After the plaintiff had departed for Oregon, the defendants in good faith, and relying on the execution of the contract by the plaintiff, took possession of the lot, and erected a building thereon. They took possession, however, *without the direction, consent, or knowledge of the plaintiff.* The latter, on his return to San Francisco, refused to perform his contract, and instituted this suit to recover possession. The defendants, thereupon, filed a cross bill to compel a specific performance. Before filing their bill, they tendered to the plaintiff the sum of $1000, with interest thereon from the time of entering into the verbal contract, but they did not pay, or offer to pay the balance of $4000, although the time had elapsed within which, according to the terms of the verbal contract, they were to pay it. The court of First Instance ordered a specific performance, and entered judgment to that effect, from which the plaintiff appeals.

George Hyde, for plaintiff.

Frederick Billings, for defendants.

By the Court, BENNETT, J. Action by plaintiff to recover possession, and cross suit by defendants for specific performance.

It is clear that the plaintiff is entitled to recover possession of the lot in question, unless the defendants have a right to compel him to convey it to them. The counsel for the defendants made a point, that, inasmuch as the plaintiff had proved no title in himself, the defendants, being in possession, could not be ousted. This is very good law when applied to a proper state of facts, but has no application in this case. The defendants, having entered into possession, claiming under the plaintiff and in subordination to his title, are estopped from questioning it. Their position is similar to that of a tenant, who cannot gainsay or

deny the title of his landlord, without having first restored the possession. The plaintiff must, therefore, recover, unless the defendants show a right to a specific performance, upon the principles adopted by courts of equity.

The affirmative of this latter position can be sustained only upon the ground, that there was a subsisting contract in writing reciprocally binding upon the parties; or that there was a verbal agreement, and part performance of it by the defendants under such circumstances, that it would be a fraud on the part of the plaintiff if he were not compelled to convey.

There was no contract in writing. A paper was drawn up which might have acquired the force of a written contract, had it been signed and delivered; but without signature or delivery, it is of no account. It was inchoate and incomplete, and neither party was bound by it.

The contract, therefore, if there was one, was merely verbal, and there is no part performance within the equitable rules which govern decisions in such cases.

A party, asking the interposition of the equitable power of the court in enforcing a verbal contract for the conveyance of real estate, should show that he has, on his part, fully complied with the *substance* of all the provisions which he engaged to perform. The verbal contract in this case was, that the defendants should pay $1000 down, and $4000 in two months thereafter, with interest at the rate of two per cent. per month. The period limited for the payment of the full amount had elapsed long before the commencement of the suit; and in order to entitle the defendants to a specific performance, they should have shown that they had paid or tendered the whole sum of $5000, with the stipulated rate of interest. This they have not done.

But the defendants say that by the Mexican law a verbal contract for the sale of land was equally valid, as if it were in writing. We think not, and so held in *Harris* v. *Brown*, (*ante*, p. 98.) There is no doubt about the correctness of that decision. There never has been a time, since the adoption of the *Feero Juzgo*, in which lands could be conveyed under Spanish or Mexican law, without an instrument in writing,—unless it was,

perhaps, in the case of an executed contract, where corporeal possession was delivered at the very time of the sale by actual entry upon the premises, and the doing of certain acts analogous to the *livery of seisin* at common law. Had this not been so, one main branch of the revenues of the Spanish Crown and Mexican Republic, called the *Alcabala*, being a duty payable upon the transfer of land, would have been easily evaded.

By *Law* 29, *lib.* 8, *tit.* 13, of the *Recopilacion de Indias*, every sale of real estate was required to be made before the *escribano* of the place where the contract was entered into, and if there were no *escribano*, before the judge of First Instance; and these officers were required to furnish a copy and statement of the writings or contracts made before them, with the day, month, and year in which they were made, the names of the seller and purchaser, the property sold or exchanged, and the price. (*Arrillaga's Decretos*, vol. for 1838, p. 421.)

Another author says, that the conveyance of lands was required to be by a written instrument, properly authenticated, (*escrito autentico.*) Without this, neither possession nor property in lands could be sustained in law; no judicial designation of boundaries, or fixing of landmarks could take place; only with the title-deeds before the eye could these important and delicate acts be performed, whether the object were to avoid a litigation, or bring a pending suit to a termination, according to justice and truth. Such importance was attached to the formalities prescribed by law for the execution of deeds of conveyance, that if, by chance, an instrument were defective in form, as, for instance, if it lacked the signature of the judge, or *escribano*, or witnesses, or parties, or an exact statement of their acts, motives, and objects, the instrument would be vicious (*vicioso*,) and consequently null, (*nulo.*) (*Ordenanzas de Tierras y Aguas*, p. 144, 145.)

So important was this principle of law deemed, that, in the convention between the Mexican government and the English holders of Mexican bonds, entered into on the 15th day of September, 1837, by which the bonds were authorized to be exchanged for lands, it was thought proper to insert a stipulation,

that after title was acquired and possession taken, the lands should not thenceforth be transferred, except by means of a written instrument in due form of law. (*Por medio de escritura de venta en la forma legal.*) (*Sec.* 5, *of such convention*, p. 53, of *Ordenanzas de Tierras y Aguas.*)

We do not doubt that a writing was as necessary for the transfer of lands in Mexico, as it is in the United States.

Judgment reversed, with costs.

SWANSTON & TAYLOR *vs.* SUBLETTE *et al.*

A. being indebted to B. delivered to him a quantity of lumber as security for payment of the debt, with the understanding that B. should proceed and sell the lumber, and pay his debt out of the proceeds. The lumber was afterwards levied upon by the defendants under an execution in their favor against A. as his property: *Held*, that the lumber was not subject to seizure under an execution against A. without payment, in the first place, of his indebtedness to B.

Where a case is made under the statute of Feb. 28th, 1850, the court will presume that all the evidence given on the trial of the cause in the court below, is contained therein.

APPEAL from the court of First Instance of the district of San Francisco. One Vogan was indebted to the plaintiffs, Swanston & Taylor, in the sum of $6000, and in order to secure that indebtedness, delivered to their possession a quantity of lumber for them to sell and pay their debt out of the proceeds. Burgoyne & Plume, two of the defendants, recovered judgment against Vogan, and directed Sublette, the other defendant, who was sheriff of the court of First Instance, to levy upon the lumber and sell it for the satisfaction of their judgment. This he did. Swanston & Taylor then brought this action against Sublette and Burgoyne and Plume jointly, to recover the value of the lumber. Judgment was rendered in the court below in favor of the defendants, and the plaintiffs appealed.

Edward Norton, for plaintiff. The lumber was not subject to seizure or levy on execution against Vogan; certainly, not without satisfaction of plaintiff's debt of $6000, which was more than the property was worth.

R. A. Lockwood, for defendants. The record does not state that no other evidence was adduced, and the intendment of law is in favor of the judgment.

The evidence is conflicting, and in such case a new trial will not be granted.

By the Court, HASTINGS, Ch. J. The respondents' counsel relies principally upon the first point made, viz: "The record "does not state that no other evidence was adduced, and the "intendment of law is in favor of the judgment." That such is the law in all courts of this jurisdiction, under the ordinary rules of practice, no one will controvert. But this is a case made under the statute of Feb. 28th, 1850, by the provisions of which we are to presume that all the evidence is embodied in the record, and the question to be settled is, whether the court below erred in finding for the respondents on the testimony. It is urged in respondents' second point, and upon the argument, that the testimony is conflicting, and that in such case a new trial could not be granted. There appears to be no discrepancy in the testimony as to the fact that appellants had the actual possession of the property in question at the time of the levy, and all the witnesses seem to agree that they had either a general or special property in the lumber seized. The court therefore erred in finding for the respondents, and the judgment is reversed, and a new trial awarded.

DALRYMPLE vs. HANSON.

The doctrine of *Ringgold* v. *Haven & Livingston*, (*ante*, *p.* 108,) that it is the duty of the court in a proper case to nonsuit the plaintiff, affirmed.

Where there is no evidence to make out a cause of action, the court should nonsuit the plaintiff.

APPEAL from the court of First Instance of the district of San Francisco. The facts of the case will be found in the opinion of the court.

————, for plaintiff.

John Currey, for defendant.

By the Court, BENNETT, J. Appeal from court of First Instance for the district of San Francisco. The complaint alleges that the defendant made a contract with the plaintiff to transport the materials for a house, together with certain boxes of merchandise, consisting of hardware, from Baltimore to San Francisco, on the defendant's ship called the *Jane Parker*—that the house and merchandise, instead of being put on board the *Jane Parker*, were shipped on another vessel belonging to the defendant, called the bark *Hebe*—that the *Jane Parker* arrived at San Franscisco two months before the *Hebe*—and that the plaintiff had sustained damage to the amount of twenty-five thousand dollars, by reason of the house and merchandise being of less value at the time of the arrival of the *Hebe*, than they would have been at the time of the arrival of the *Jane Parker*.

The defendant, in his answer, denies that he undertook to carry the property in question on the *Jane Parker*, but alleges that it was understood and agreed that it should be shipped on the *Hebe*. He also alleges that the property was of greater value at the time of the arrival of the *Hebe*, than such property was worth at the time of the arrival of the *Jane Parker*.

The case was tried before a jury. Three witnesses were sworn on the part of the plaintiff. One of them, William H. Stump, testified as follows:—"That he knew the parties, and that some-"time before the sailing of the ship *Jane Parker* from Balti-"more to San Francisco, the defendant told witness that he was "going to take a house for plaintiff from Baltimore to San "Francisco—that plaintiff was not then present on the *Jane* "*Parker*—that sometime after, witness saw the materials of a "house on the wharf of the *Jane Parker*, marked with the "initial letters of the plaintiff's name—that, at that time, the "bark *Hebe* was lying at the wharf, about one hundred feet "from the *Jane Parker*—that all he knew about the contract "to take the house on the *Jane Parker*, was what the defend-"ant said to him as before stated—that at the time defendant "told the witness that he was going to take the house as men-"tioned, witness knew nothing about the defendant's having "the *Hebe*."

Samuel Stump, on the part of the plaintiff, testified "That he "saw a house, some five or six days before the *Jane Parker* "sailed, marked with the initials of the plaintiff's name, lying "upon the wharf at Baltimore—that the bark *Hebe* was then "lying about one hundred feet from the *Jane Parker*—that "the only way he knew the house was plaintiff's was by the "initial letters."

One Latimer, on the part of the plaintiff, testified "That "there was but little difference between the price of hardware, "at the time of the arrival of the *Jane Parker*, and the *Hebe's* "arrival—that hardware at those dates was dull, and but few "sales were made."

The above is all the evidence which the return shows was given, and upon this the plaintiff rested his case. The counsel for the defendant moved for a nonsuit, on the ground that the plaintiff had not proved a sufficient case to go to the jury. The court denied the motion, on the ground that the court could grant a nonsuit in no case whatever.

The defendant, then, in addition to other matters, gave in evidence two bills of lading, by which the articles in question

were shipped at Baltimore, on the bark *Hebe*, and on each of which was endorsed a receipt of the contents by the defendant at San Francisco. There was no claim that the goods were not delivered in good condition.

The jury found a verdict for the plaintiff for the sum of $1900. The defendant moved the court below for a new trial, and the court ordered the verdict to be set aside and a new trial granted, unless the plaintiff would consent to a reduction of sixteen hundred dollars from the verdict. The plaintiff consented to this reduction, and the court rendered judgment for $300 and costs. From this judgment the defendant appeals.

We have held, at this term of the court, in *Ringgold* v. *Livingston*, that if the plaintiff's evidence be insufficient in law to authorize a jury to find a verdict for the plaintiff, or if the court would set aside the verdict, if so found, as contrary to evidence, it is the duty of the court to nonsuit the plaintiff. That rule applies to this case. There is no pretence of any evidence, that the defendant undertook to carry any of the property in question on the *Jane Parker*, except the *house*, and all the evidence in relation to the *house* is the declaration of the defendant, "That he was going to take a house for plaintiff from Baltimore "to San Francisco," and that, sometime after this declaration was made, the materials of a house, marked with the plaintiff's initials, were seen on a wharf at which the *Jane Parker* and the *Hebe* were both lying. We do not see how this proves a contract to ship the house on the *Jane Parker*. The court ought not to have permitted the cause to go to the jury upon such evidence. It should have granted the motion for a nonsuit.

Besides, even though the nonsuit were properly refused, the bills of lading completely countervail the force of the plaintiff's evidence. It is impossible to conceive how a jury, not acting under some mistake or misapprehension, and uninfluenced by passion or prejudice, could find for the plaintiff, upon the evidence given, a verdict of one thousand and nine hundred dollars. So manifestly contrary to evidence was their verdict, that the court below was obliged to deduct more than five-sixths from the amount which they found. We must complete the act of

justice which the court below only partially performed, and deduct the balance.

Judgment reversed, with costs.

STEVENSON vs. LICK.

An action cannot be maintained against A., to recover damages for a trespass to real estate committed by B.

ALL the facts necessary to be stated in this case, are contained in the opinion of the court.

By the Court, BENNETT, J. Appeal from court of First Instance for the District of San Francisco. The complaint alleges that Lick, on the 28th day of March, 1849, leased to one Blanchard certain premises in San Francisco, on which there was an *adobe* house; that Blanchard, on the 15th day of September following, assigned the lease to the plaintiff; and that afterwards, "*D. W. Chandler & Co., in pursuance of some proceeding* "*which they claimed authorized them, tore down said house.*" The prayer of the complaint is, that Lick may be decreed to pay to the plaintiff the value of the house.

The defendant pleaded the general issue. The cause was tried before the court, without a jury; and, after hearing the proofs of the parties, the court rendered the following judgment: "That the said Lick pay to the said Stevenson the sum of four "hundred and ninety dollars, as damages to the said Stevenson "for being deprived of the use and enjoyment of the house "named in the plaintiff's declaration, from the time it was torn "down to the end of the term; or, at the option of the plaintiff, "to be signified in open court within a day from this time, that "instead of the sum of four hundred and ninety dollars, as afore-"said, that the plaintiff retain and enjoy the said house named "in the declaration to the end of the said term; and also that

" said defendant pay the costs and charges in this behalf ex-
" pended, and that plaintiff have execution therefor."

The plaintiff appeals from this judgment, and asks that it may be reversed. His prayer should be granted. Having ascertained his mistake, in supposing that *Lick* could be made answerable for the trespasses of "*D. W. Chandler & Co.*," the plaintiff seems desirous of preventing the wrong which would be done to the defendant by the execution of the judgment of the court below. We think he should not be thwarted in this laudable purpose.

It is unnecessary to examine the proceedings subsequent to the complaint, even if they were before us in an intelligible shape; for there can be no supposable proof which would authorize a judgment in favor of the plaintiff upon the facts set forth in his complaint.

Judgment reversed, with costs.

TEWKSBURY *vs.* LAFFAN.

Where a contract is made to convey land by a quit-claim deed at a future time, an action cannot be maintained by the vendee against the vendor, on the ground that a third person has intruded upon a portion of the land, and the vendee cannot obtain possession, there being no stipulation in the contract that the vendee shall be put in possession.

Nor can such action be sustained on the ground that the vendor, long after the execution of the contract, gave the vendee a certificate to the effect, that, at the time of making the agreement, he consented and agreed that the vendee should take possession of the lot forthwith.

APPEAL from the court of First Instance of the district of San Francisco. The facts of the case will be found in the opinion of the court.

By the Court, BENNETT, J. On the 11th day of October, 1849, Laffan made his bond to Tewksbury conditioned to exe-

cute and deliver a quit-claim deed of a lot of land, upon the latter paying certain notes, the last of which will not become due until the 1st day of November next. On the 2d day of January, 1850, Laffan gave to Tewksbury a certificate in writing, which, after particularly defining the boundaries of the lot, which were left uncertain in the bond, contained the following clause: "And I did at the time of the said agreement "consent and agree that the said Tewksbury should have the "possession of said lot forthwith." This certificate was objected to, at the trial, as irrelevant and inadmissible evidence. It appeared, on the trial, that a third person, not connected with or acting under Laffan, had encroached upon a small portion of the premises, so that Tewksbury could not erect thereon a house of particular dimensions, which he had bought for that purpose, without alteration. The cause was heard before referees, who reported in favor of the plaintiff for $1,500 damages, for which sum, and costs, the judgment was rendered from which this appeal was taken.

There is no ground for any action whatever in this case. The only thing to which Laffan bound himself was, to give a quit-claim deed. The period for executing that has not arrived, and there is no pretence of any breach of this condition. The action seems to have been brought upon the supposition that a bond to give a quit-claim deed implies a covenant, not only to deliver possession, but to protect and insure the obligee against trespassers. But an agreement to give a quit-claim deed cannot surely confer greater rights than would be acquired under a deed containing express covenants of warranty, seisin, and quiet enjoyment; and the facts of this case are insufficient to sustain an action even upon a deed embracing all these covenants. (*Gardner* v. *Ketteles*, 3 *Hill*, 330; *Sedgwick* v. *Hallenbeck*, 7 *J. R.* 376.)

The certificate does not help the plaintiff. It was executed long after the bond, and forms no part of the original contract. It is not in itself an agreement upon which an action can be based; there is no mutuality, no consideration. It purports to be simply a recital of a stipulation in a previous agreement,

and, upon referring to the agreement, we find no such stipulation. If it be regarded as Laffan's interpretation of his bond, he seems to have misapprehended the legal effect of his contract; but such misapprehension cannot serve as the foundation of an action. The certificate, then, being neither a contract in itself, nor a part of the original agreement, it was inadmissible evidence for any purpose whatever, except to explain the ambiguity in the bond as to the location of the lot intended to be conveyed. If it means that Laffan consented and agreed verbally, at the time of making the contract, it amounts to nothing; for, where an agreement is reduced to writing, all stipulations, and conditions, and provisions relating to the subject matter of the contract, are merged in the writing, except in some special cases, of which this is not one.

But further, conceding that this stipulation formed a part of the original contract in writing, the result would be the same. It imports nothing more than a privilege or license to the plaintiff to take possession of the lot before the expiration of the period for executing the quit-claim deed; but it does not imply that the defendant, in case a third person held the lot, or a portion of it, should either deliver possession, or be liable for damages in the event of the plaintiff being unable to acquire possession.

Judgment reversed, with costs to the defendant in both courts.

Parker *vs.* Shephard *et al.*

Where a summons was issued and served in the morning, by which the defendants were cited to appear and answer the complaint in the court of First Instance, at 10 o'clock, and judgment was rendered against them at 9 o'clock in the morning of the same day; *Held*, that the judgment was irregular, and should be reversed, notwithstanding the court offered them permission to come in at a subsequent day and make their defence.

Appeal from the court of First Instance of the district of San

Francisco. The facts upon which the judgment of the court was based, are stated in the opinion of the chief justice.

Mr. Shaw, for plaintiff.

Horace Hawes, for defendants.

By the Court, HASTINGS, Ch. J. It appears from the record that the defendants were cited to appear and answer the complaint at the hour of 10 o'clock of the day specified for trial. That the judgment was rendered at the hour of 9 o'clock of said day, on *ex parte* proof of plaintiff's title, the defendants not being present.

From this decision of the court the appeal is taken.

The proceedings of the court of First Instance, one hour before the time of trial, are evidently irregular, and could not be corrected but by consent of parties. The defendants, it seems, had several days allowed by the court within which to appear and make their defence; and inasmuch as it does not appear that they could *not* have had a fair trial on the merits, we think it but just that the costs of this court should abide the event of a new trial.

The judgment, therefore, of the court of First Instance is reversed, and a new trial upon the merits awarded.

JOHNSON *vs.* PENDLETON *et al.*

Where there is conflicting evidence on the trial of a cause and no rule of law appears to have been violated, a judgment will not be reversed on the supposition that the jury may have come to a wrong conclusion as to a matter of fact.

APPEAL from the district court of Santa Clara county. The only material facts will be found in the opinion of the court.

Frederick H. Sanford, for plaintiff.

S. Heydenfeldt, for defendant.

By the Court, BENNETT, J. The plaintiff's action is for services as clerk in a store. The defendants deny that they are indebted to the plaintiff, but claim that he is indebted to them. This is the substance of the pleadings. The cause was tried before a jury, and judgment rendered, upon their verdict, for $479,47 in favor of the plaintiff. The defendants appeal. At the trial the testimony was conflicting; no point of law was ruled against the defendants; and they seem to have appealed solely upon the ground that the jury came to an incorrect conclusion upon a matter of fact. We have already held, in several cases, that we ought not to disturb the verdict of a jury upon a question of fact, where the evidence is conflicting, and where no rule of law appears to have been violated. These decisions control this case.

Judgment affirmed with costs.

HORRELL *vs.* GRAY.

A Second Alcalde has not jurisdiction of any claim exceeding $100. Thus where judgment was rendered by him for $1030,50, it was reversed.

APPEAL from a judgment of the Second Alcalde of the district of Sonoma. The facts will be found in the opinion of the court.

J. W. Brackett, for plaintiff.

R. Hopkins, for defendant.

By the Court, LYONS, J. This case, from the moment of its inception to its appearance here, presents to view a curious anomaly. It was commenced before the Second Alcalde

of Sonoma district, an officer whose jurisdiction was limited by law, to causes in which the amount claimed was one hundred dollars or under. Plaintiff sued for one thousand and forty-seven $\frac{50}{100}$ dollars, and the Second Alcalde rendered judgment against defendant for one thousand and thirty $\frac{50}{100}$ dollars. From this judgment an appeal was taken to the court of First Instance. The judge of the last named tribunal assigned the cause for trial on the nineteenth day of April next ensuing, and afterward, for a most novel reason divulged by the record, abridged the delay before granted, and, without the consent of defendant, ordered the cause to be tried at an earlier day. An abortive attempt was made to try the cause on the day last named, but no judgment therein was rendered, and the case thus comes here for final adjudication. The whole proceedings are irregular. The Second Alcalde exceeded his jurisdiction, and the subsequent acts are an entire departure from all legal rules.

Judgment of the court below reversed.

Belt *vs.* Davis.

By a final judgment is to be understood, not a final determination of the rights of the parties in the subject matter of the litigation, but merely of the particular suit.

Thus, where a judgment was rendered in the court of First Instance, and the defendant filed a complaint in the district court to vacate and annul the judgment on the ground of fraud, &c., to which an answer was put in, and the cause tried in the district court, and judgment given in accordance with the prayer of the complaint; *held*, that this was a final judgment from which an appeal would lie to this court.

The definition of a final judgment given in *Loring* v. *Illsley*, (*ante*, *p.* 24,) explained.

Where it appears on the face of the judgment record itself, that there was no trial before a jury and no evidence given to the court, it will not be presumed on appeal that any evidence was adduced in the case, but the court will presume that the cause was heard on the pleadings alone.

It seems, that the certificate of the clerk of the district court could not be received to contradict the plain import of the judgment.

The supreme court alone has a revisory jurisdiction, by way of appeal, over judg-

ments of courts of First Instançe; and in respect to such judgments, district courts are not courts of review, and have no jurisdiction to examine into their regularity or validity, unless, perhaps, in case of a judgment fraudulently rendered.

The decision in *Von Schmidt* v. *Huntington*, (*ante*, *p.* 55,) that where a cause is heard on bill and answer the allegations of the latter are to be taken as true, affirmed.

Thus where a bill was filed to set aside and vacate a judgment, on the ground that it was obtained through fraud, venality and corruption, and these charges were all sufficiently denied in the answer, and the cause was heard on the pleadings; *held*, that the effect of the denial in the answer was the same as if the charges in the bill had been disproved by testimony.

APPEAL from the district court of the county of San Joaquin. The facts are stated in the opinion of the court.

Gregory Yale, for plaintiff and respondent.

Hall McAllister & D. M. Perley, for defendant and appellant.

By the Court, BENNETT, J. The appellant recovered a judgment, on the 19th day of February last, against the respondent for $5948, in the court of First Instance of the district of San Joaquin. This judgment was, by virtue of the act superseding certain courts, transferred into the district court for the county of San Joaquin in the fifth judicial district, and an execution was issued thereon and levied upon the property of the respondent. He then filed a complaint in the district court, alleging that the judgment was obtained by means of collusion, venality and corruption, and also complaining of irregularities, errors, and abuse of power by the court, during the progress of the trial which resulted in the judgment. There seems to have been no ground for the charge of collusion, &c. Upon this complaint an injunction was issued, and the sheriff restrained from proceeding under the execution. The appellant demurred to a portion of the bill, pleaded the judgment of the court of First Instance in bar, and supported his plea by answer under oath denying the matters charged in the bill on which the judgment was sought to be impeached. The cause was heard upon the pleadings, no testimony being introduced by either

party, and the district court set aside the judgment, and awarded a new trial, from which determination this appeal is brought.

It is claimed by the counsel for the appellant, 1st, That the district court had no power to set aside, modify, or in any way invalidate the judgment rendered by the court of First Instance; and 2d, That, admitting the power, the facts do not present a proper case for the exercise of it; whilst, on the part of the respondent, it is contended, 1st, That the return of the district court does not appear to be a full and complete record, and that the presumption, therefore, must be, that there was sufficient evidence to warrant the decision of the district court; and 2d, That the determination appealed from is not a final judgment from which an appeal may be taken.

The first question to be determined is, whether the decision of the district court be a final judgment. By section 258 of the Practice Act of April 22, 1850, it is enacted that no appeal shall lie from any but a *final judgment;* and it is, to say the least, very questionable whether section 279, which authorizes the court to reverse, affirm, or modify any judgment, *order*, or *determination* appealed from, can be properly construed as qualifying the positive prohibition of the previous section. What, then, is meant by the term *final judgment*, as used in this statute?

In the case of *Loring* v. *Illsley*, decided at the March term of this court, we ventured from recollection, unaided by authorities, of which there was then none at our command, to give a definition of an order as distinguished from a final judgment. We find, on looking into the authorities, that the definition there attempted, although sufficiently broad to cover the case then under consideration, is too restricted, and that the term *final judgment* has a somewhat more comprehensive meaning.

The case of *Beach* v. *Fulton Bank*, (2 *Wend.* 225,) and the case of *Mc Vickar* v. *Wolcott*, (4 *J. R.* 510,) cited by the counsel for the appellant, are not in point. The former was an appeal from an order of the chancellor denying an application made by the appellants to open the proofs in the cause, for the

purpose of re-examining witnesses; and the latter was an appeal from an order of the chancellor refusing to dissolve an injunction. In each case the appeal was, confessedly, from an *interlocutory order*, and was entertained solely by virtue of the statute then in force, which expressly extended the appellate jurisdiction of the court for the correction of errors, to *interlocutory orders* of the court of chancery.

On the other hand, the supervisory control of the court of errors over the proceedings of the supreme court of New York, reached only to final judgments, and the decisions in such cases, therefore, are entitled to consideration in determining the question under discussion. In *Yale* v. *The People*, (6 *J. R.* 602,) which went up to the court of errors from a decision of the supreme court refusing to allow a *habeas corpus*, it was held, that whenever a decision was made in the supreme court, which was final, and of which a record could be made, and which decided the rights of property or personal liberty, the court of errors had jurisdiction. In *Clason* v. *Shotwell*, (12 *J. R.* 31,) on an indictment for a forcible entry and detainer, no return could be obtained to a *certiorari*, by reason of the death of the justice before whom the proceedings were had, and the supreme court had investigated the cause on affidavits and awarded a restitution. The court of errors held, that it might review the proceedings on the evidence presented to the court below; and it was said, that the true inquiry, in determining the question whether the decision under review was an order or a final judgment, was whether the judicial proceeding constituted a cause by itself, and had received its final decision in the supreme court; if so, the case contemplated by the constitution existed, and the cause might be brought to the court of errors for revision. The rule as finally settled in that court, is that every definitive sentence or decision of the supreme court, by which the merits of a cause are determined, although it be not technically a judgment, or the proceedings are not capable of being enrolled, so as to constitute what is technically called a record, is a judgment within the meaning of the law, and as such, subject to the revisory jurisdiction of the court of errors.

(*Graham on Juris.* 602.) The rule is the same when applied to the jurisdiction of the supreme court of the state of New York in reviewing the final judgments of inferior courts, and is in no respect different from the common law rule as established by the court of king's bench in England; according to which, by a final judgment is to be understood, not a final determination of the rights of the parties, but merely of the particular suit. Thus, for instance, a judgment of nonsuit, other than where the plaintiff submits to a voluntary nonsuit, is a final judgment even though no costs be awarded against the plaintiff, inasmuch as he is aggrieved by being defeated of his right of action in that suit, and of his costs in prosecuting it. (*Graham on Juris.* 233.) In strict accordance with the rule as thus given is the decision of the supreme court of the United States in *Weston* v. *The City Council of Charleston.* (2 *Peters*, 449.) The 25th section of the judiciary act of the United States enacted, that a final judgment or decree in any suit in the highest court of law or equity of a state in which a decision in the suit could be had, might be re-examined and reversed or affirmed in the supreme court. It was held, under this act, that the words *final judgment* in the above section must be understood as applying to all judgments and decrees which determine the particular cause, and that it was not requisite that such judgments should finally decide upon the rights which are litigated. This appears then to be the correct rule so far as it can be expressed in any general definition, without reference to the particular nature of each individual case; but the remark of Senator Sandford, in *Clason* v. *Shotwell*, above cited, is worthy of being borne in mind in connection herewith, "that this question is not to be determin-"ed by technical definitions and verbal criticisms on the terms "and phrases in which judgments have been, or may be, ex-"pressed."

Does, then, the determination appealed from in the case at bar come within the rule as above laid down? The proceeding was commenced as an original suit, in the ordinary way, by filing a complaint; and this complaint was contested by the defendant, in his answer thereto, as an original proceeding, and

not as a continuation of the suit instituted by him in the court of First Instance. The complaint alleges matters by reason of which it is prayed that the judgment of the court of First Instance be set aside and a new trial granted. The answer denies the matters charged in the complaint, and insists that the district court ought not to set aside the former judgment and grant a new trial. The whole scope and object of the suit, therefore, is to vacate the judgment and procure a new trial; and whether this should, or should not be done, is the point upon which the issue of the parties is made up. That issue has been finally and definitively determined by the district court, and there is, consequently, no further judgment to be rendered in the suit. This particular cause is completely at an end, and whether the judgment be affirmed or reversed, nothing more remains for the district court to do in this suit, but to issue execution against the unsuccessful party for the costs. The argument at the bar seemed to proceed upon the hypothesis, that the new trial prayed for would, if granted, take place in this suit and be a continuation thereof, instead of taking place in, and being a continuation of, the original cause commenced before the court of First Instance. But this supposition involves the solecism of a new trial being had in a cause in which no trial at all had ever taken place. The new trial, then, would be a proceeding, not in this, but in the former suit—and this particular cause is, by the decision of the court below, completely disposed of. The determination appealed from is, even within the restricted rule laid down in *Loring* v. *Illsley*, a final judgment.

The next question is as to the completeness of the record. It is claimed not to be so, on the ground of a supposed defect in the certificate of the clerk of the district court. The certificate is, that the return is a correct transcript of the proceedings in the cause, but does not contain the usual, and in most cases necessary words, that it is a correct transcript of the whole thereof. It is not pretended that the record is defective in any respect, except that it does not contain any evidence; and upon this negative ground the argument is based that we must presume,

in favor of the proceedings, that there was sufficient proof adduced in the court below to warrant and sustain the judgment. In *Gonzales* v. *Huntley*, decided at the March term, this rule was applied. In that case, however, it appeared from the record, that the cause had been tried before a jury, and the inference was irresistible that there must have been evidence of some description before them upon which their verdict was based; but none of the proceedings or testimony at the trial was returned, and, there being no error apparent on the face of the record, the judgment was affirmed. In the case at bar it does appear from the record returned, that there was no trial before a jury and no evidence given to the court. The judgment itself states that the cause was heard on bill, demurrer, plea, and answer; which is, if legal language has any meaning at all, proof of record that no evidence was adduced, equally clear and explicit as if the clerk had, in so many words, certified to that effect; for when it is said, that a cause was heard on bill and answer, or on plea or demurrer, the expression itself, *ex vi termini*, precludes the idea of proofs having been taken. In case proofs have been taken, the language used is, that the cause was heard on pleadings and proofs. It would be worse than useless to put the parties to the expense and delay of procuring a formal certificate of the clerk upon the point in dispute, when such certificate, if procured, could not be received to contradict the plain import of the judgment itself. We shall, therefore, consider the cause as having been heard upon the pleadings alone without proofs; which brings us to the inquiry, whether the district court had the power which it has assumed to exercise, and whether, if it had such power, it has been properly used.

First, as to the existence of the power. The case must be con trolled by the act regulating appeals, approved February 28th, 1850, which gives to the supreme court alone a revisory jurisdiction, by way of appeal, over judgments of courts of First Instance, whether such judgments have been transferred to the district court or not. By the 29th section of that act, jurisdiction over judgments rendered in courts of First Instance is conferred, in general terms, upon the district courts, upon the

transfer of such judgments from the former to the latter. The 31st section provides for appeals from such judgments after their transfer, and directs by whom the return shall be made. The 32d section provides for the settlement of a case, in order to bring the testimony and the other proceedings at the trial before this court; and the 33d section declares that the district court shall proceed to hear, try, and determine all suits and proceedings transferred therein, in which judgments shall not have been rendered in the courts of First Instance, but no portion of the statute gives the district court, either expressly or by implication, jurisdiction to set aside, modify or impair any judgment already rendered by a court of First Instance, either upon motion in the same suit founded upon affidavits, or by an original complaint having for its object the attainment of that end. The only portion of the statute, which can be urged as conferring that power, is the last clause of section 29, which declares that the district court shall have jurisdiction over the judgments of courts of First Instance transferred as therein provided; but this clause should be limited to the jurisdiction necessary to be exercised in enforcing the judgment, and settling the rights and claims of different parties growing out of it, and should not be construed as conferring a power in hostility to the spirit of the whole act. The district court is not, in respect to such judgments, a court of review, and has not, either directly or indirectly, jurisdiction to examine into their propriety or validity, unless, perhaps, where a clear case of fraud should be made out. The act to regulate proceedings in the district courts, &c., approved April 22d, 1850, has nothing to do with the case; but we may be allowed to express our doubts whether that act would authorize a proceeding of this description in any case. The method of correcting errors therein pointed out, is by appeal, or by motion for a new trial in the cause in which the original judgment was rendered, but we doubt whether it countenances the institution of a new suit for that purpose.

Secondly. If the district court possessed the jurisdiction claimed, was it properly exercised. The bill alleges matters which would probably be sufficient to invalidate the judgment

upon application to a court of chancery, if such court existed. But the plea and answer deny all the material allegations of the bill, and, in turn, prefer various charges against the plaintiff. The answer to the question last proposed, must therefore depend upon the effect which is to be given to an answer, when a cause is heard on bill and answer, or to a plea, when the cause is set down for hearing upon the plea. In the case of *Von Schmidt* v. *Huntington*, decided at the March term, it was held that where a cause was brought to hearing on bill and answer, the allegations of the latter are, with but a single qualification, to be taken as true in all respects, and this, entirely independent of the inquiry whether such allegations are responsive to the bill, or are set up as a distinctive defence by way of avoidance. A different rule assumed by counsel upon the argument has induced us to look into the books, from which we find that the position taken in *Von Schmidt* v. *Huntington* is amply sustained by the highest authorities. The doctrine is coeval with the earliest regular administration of the chancery jurisdiction in England; for it was one of Beame's orders, that when the hearing is on bill and answer, the answer is admitted as true in all respects. From that time to the present the rule has never been once questioned in England. The following is the language upon this subject of a modern treatise on chancery practice, of the highest respectability: "Where the cause is heard "on bill and answer, every matter set up in the answer, whe"ther responsive to the bill or of pure avoidance, must be taken "as true; and this is the rule even where the defendant only "avers that he believes and hopes to be able to prove such "facts." (1 *Hoffman's Ch. Pr.* 222.) The same practice is asserted in the following authorities: *Brinckerhoff* v. *Brown*, 7 *John. Ch. Rep.* 217; 1 *Wash. R.* 162; 5 *Mum.* 467, 483; 6 *id.* 142. The same rule holds good in the case of a chancery plea. If it is bad in form and substance, but the facts are true, the plaintiff sets it down for argument—but if it is considered good in form and substance, but the facts are not true, the plaintiff takes issue upon it by a replication, and proceeds to examine witnesses as in case of an answer. (1 *Hoffman's Ch. Pr.*

222; *Mitford's Tr. on Plead.* 244; *Cooke* v. *Mancius*, 4 *Johns. Ch. R.* 166.) The pleadings and proceedings in this cause seem to have been conducted throughout according to the system of chancery practice, rather than under the new practice of this state; and, no objection being made, we think we should consider them in the same way. The plea and answer, then, being assumed as true, in all respects, there is no ground upon which the judgment appealed from can be sustained. It must, therefore, be reversed with costs to the appellant in both courts.

THE PEOPLE, *ex rel.* MULFORD *et al. vs.* TURNER, Judge of the Eighth Judicial District.

This court is strictly a court of appellate jurisdiction; but it may exercise its appellate jurisdiction by means of the process of *mandamus*. So also, it *seems*, by means of the writs of *habeas corpus*, *certiorari*, *supersedeas*, *prohibition*, &c.

The court will not undertake, in the first instance, to supervise, direct, or control the acts or omissions of a mere ministerial officer; but where the effect of the application is to bring under review the decision of a district court, the appellate jurisdiction given by the constitution attaches, and may be exercised by means of the writ of *mandamus*.

Striking an attorney's name from the rolls is not to be regarded in the light of a punishment as for contempt, but rather as the exercise of a power inherent in every court which has authority to admit attorneys, of expelling them from the bar when guilty of misconduct; but where an attorney is proceeded against for this purpose, he is entitled to have notice of the charges against him, and an opportunity to make his defence.

The writ of *mandamus* is a proper remedy to compel the district court to restore an attorney whose name has been stricken from the rolls by the order of such court.

Where notice of the motion for a *mandamus*, and a copy of the papers on which the motion is founded, have been duly served on the district judge, *this* court may, in its discretion, issue either an alternative, or a peremptory writ, in the first instance.

Where an order had been made by the district court of the eighth judicial district, expelling certain attorneys from the bar, on the ground that they had set at defiance the authority of the court, and had vilified and denounced its proceedings, but no notice had been given of the charges against them, and no opportunity afforded to make their defence; *Held*, that a writ should issue commanding the district court to vacate the order, and restore the parties.

This was an application for a writ of *mandamus* to the district judge of the eighth judicial district, to command him to vacate an order striking the names of the relators from the roll of the court as attorneys. The facts are stated in the opinion of the court.

Stephen J. Field, on the part of the relators.

By the Court, Bennett, J. Application for a writ of *mandamus*. At a term of the district court of the eighth judicial district, held in and for the county of Yuba, on the tenth day of June last, the following order was made:—"Whereas Messrs. "Field, Goodwin, and Mulford, having set at defiance the au-"thority of this court, and having vilified the court, and de-"nounced its proceedings, the said Field, Goodwin, and Mul-"ford are hereby, by order of the court, expelled from the bar "of the same."

An application is now made for a writ of *mandamus* to require the court to vacate the above order, and reinstate the applicants. Copies of the papers upon which the motion is founded, together with notice of the motion, have been duly served upon the judge of the eighth judicial district.

Two questions are presented by this application: First, Has this court the power to issue a writ of *mandamus* to the district court? and, secondly, Whether, conceding the existence of the power, the case presented is a proper one for its exercise?

First, as to the power. The seventh section of the act organizing this court, declares that "the court, and each of the jus-"tices thereof, shall have power to issue writs of *habeas corpus*, "of *mandamus*, of *injunction*, *certiorari*, *supersedeas*, and such "other writs and process known to the law, as may be neces-"sary in the exercise of their jurisdiction." This section containing an express delegation of power to issue the writ of *mandamus*, there can be no question that, so far as statutory authority is concerned, the power resides in the court, to issue such writs in all cases in which they may appear to form the appropriate remedy. The only doubt which can be entertained upon

the subject, arises under the constitution which creates the court, and from which all its powers must be derived.

The first section of article 6 of the constitution vests the judicial power of the state in the supreme court, in district courts, in county courts, in justices of the peace, and in such municipal and other inferior courts as the legislature may deem necessary. Section 4 of the same article is in the following words:—"The "supreme court shall have appellate jurisdiction in all cases "where the matter in dispute exceeds two hundred dollars, "when the legality of any tax, toll, or impost, or municipal "fine is in question, and in all criminal cases amounting to fe-"lony or questions of law alone. And the said court, and each "of the justices thereof, as well as all district and county judges, "shall have power to issue writs of *habeas corpus* at the in-"stance of any person held in actual custody. They shall also "have power to issue all other writs and process necessary to "the exercise of their appellate jurisdiction, and shall be con-"servators of the peace throughout the state." The subsequent sections of the same article confer upon the district courts and the county courts "original jurisdiction," in law and equity, in all civil cases, and in all criminal cases not otherwise provided for. From the section of the constitution above quoted, in connection with the context, it appears entirely clear, that, with the single exception of proceedings upon writs of *habeas corpus*, this court has no original jurisdiction, and that the legislature can confer upon it none. It is strictly a revisory tribunal: its jurisdiction is, with the exception above-mentioned, exclusively appellate; and in the exercise of that appellate jurisdiction, and of that alone, can it issue such writs and process as may be necessary to render such jurisdiction effectual.

What, then, is the extent of that appellate jurisdiction? In the determination of this question we are fortunate in being furnished with a sure guide by the decisions of the highest tribunal of our country in their interpretation of the constitution of the United States. The judicial power of the United States is vested, by the constitution, in one supreme court, and in such inferior courts as Congress may from time to time ordain and establish;

and it extends to all cases, in law and equity, arising under the constitution, treaties, and laws of the United States, to all cases affecting ambassadors, other public ministers and consuls, and to a variety of other cases particularly enumerated. It is then declared, by the second section of the third article of the constitution of the United States, that "in all cases affecting ambassadors, other public ministers and consuls, and those in which "a state shall be a party, the supreme court shall have original "jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law "and fact, with such exceptions, and under such regulations as "Congress shall make." It is thus perceived that, by the constitution of the United States, the supreme court is vested, in some cases, with original, in others, with appellate jurisdiction; as, by the constitution of California, this court has, in one class of cases, original, and in other cases, appellate jurisdiction. The distinction between these different species of jurisdiction, taken in the one instrument, is substantially the same as the like distinction made by the other; the language used to express this distinction is strongly analogous in both; and, thus, the judicial interpretation of this portion of the constitution of the United States may be safely relied upon in giving construction to the constitution of our own state.

The leading case in which the section above referred to, of the constitution of the United States, came up before the supreme court, is that of *Marbury* v. *Madison*, (1 *Cranch*, 137.) It was there declared to be an essential criterion of appellate jurisdiction, that it revises proceedings already instituted, and does not institute them; and that to enable the court to issue a *mandamus*, it must be shown to be an exercise of appellate jurisdiction, or be necessary to enable the court to exercise such jurisdiction; and it was held, in pursuance of these principles, that though the court might, in exercising its appellate jurisdiction, issue a *mandamus* to other courts, yet to issue such writ to an officer for the delivery of a paper, such as a commission, would be, in effect, the same as to sustain an original action for that paper, and therefore belonged not to appellate, but to original

jurisdiction; and that, consequently, the authority given by the 13th section of the Judiciary Act of 1789, to issue writs of *mandamus* to public officers, was not warranted by the constitution. In *M'Cluny* v. *Silliman*, (2 *Wheat.* 369,) the application for a *mandamus* was refused on the authority of *Marbury* v. *Madison*, and the doctrine of the latter case has been adhered to and recognized in subsequent adjudications as the settled law of the court. But, whilst *Marbury* v. *Madison*, and its kindred cases, define the limits beyond which the court cannot go, there are, on the other side, several decisions which point out the extent of the powers of the court in the exercise of its proper appellate jurisdiction.

Thus in Hamilton's case, (3 *Dall.* 17,) in Burford's case, (3 *Cranch*, 448,) and in Bollman & Swartwout's case, (4 *Cranch*, 75,) the power to issue writs of *habeas corpus* was declared to belong to the court. Chief Justice Marshall in delivering the opinion of the court in the case last cited, says: "In the *man-*" *damus* case, *Marbury* v. *Madison*, it was decided that this " court would not exercise original jurisdiction, except so far as " that jurisdiction was given by the constitution. But so far as " that case has distinguished between original and appellate juris-" diction, that which the court is now asked to exercise is clearly " appellate. It is the revision of the decision of an inferior court, " by which a citizen has been committed to jail." And again, in the same case, he remarks: "The decision that the indivi-" dual shall be imprisoned must always precede the application " for a writ of *habeas corpus*, and this writ must always be for " the purpose of revising that decision, and therefore appellate " in its nature." The same court determined in *ex parte* Crane, (5 *Pet.* 189,) that it had power to issue a *mandamus* to a circuit court, commanding the court to sign a bill of exceptions in a case tried there; and in *ex parte* Bradstreet, (7 *Pet.* 634,) the court below was required, by a like writ, to make up a record and give judgment thereon. In Crane's case the chief justice says, that "a *mandamus* to an officer is held to be the exercise of " original jurisdiction; but a *mandamus* to an inferior court of " the United States, is in the nature of appellate jurisdiction."

The conclusion deducible from the above cases appears to be, that the court will not undertake, in the first instance, to supervise, direct, or control the acts or omissions of a mere ministerial officer; but that, when the object and effect of an application to it is to bring under review the decisions of an inferior court, or to direct its action, or control or annul its excesses, the appellate jurisdiction given by the constitution attaches; and that the court may exercise that appellate jurisdiction, in some cases by means of the writ of *habeas corpus*, and in others by means of the writ of *mandamus*.

The authorities above cited, by which the appellate jurisdiction of the supreme court of the United States is determined, though not of binding force upon us, are yet strictly in point to show the extent of the like jurisdiction, which this court may, if compatible with the judicial organization of the state, legitimately assume; and which it ought to assume, if it would be a result of the denial of the power, to leave the judicial system imperfect, or destroy its harmony, or impair the adaptation of its various parts. That this result would follow a denial of the existence of the power, appears to be an inference fairly deducible from the very nature of the writ of *mandamus*, which necessarily implies the idea of a superior and an inferior tribunal.

This writ, says *Blackstone*, (3 *Comm.* 110,) "issues to the "judges of any inferior court, commanding them to do justice "according to the powers of their office, whenever the same is "delayed. For it is the peculiar business of the court of king's "bench to superintend all other inferior tribunals, and therein "to enforce the due exercise of those judicial or ministerial "powers with which the crown or legislature have invested "them; and this, not only by restraining their excesses, but "also by quickening their negligence, and obviating their denial "of justice." A *mandamus*, therefore, implies the power to command, and the duty of obedience—a relation, incompatible with the equality of the tribunal from which the writ issues, and the tribunal to which it is directed. But the several district courts of the state have all the same jurisdiction and powers. They all stand on the same level. There is neither

superiority nor inferiority in their relations to each other. There is neither the right to command or prohibit, nor the duty to obey. And it would be inconsistent with the relations which they hold towards each other, that one should attempt to supervise, or direct, or restrain the action of another by the writ of *mandamus*, or by the writ of prohibition. If, therefore, this court does not possess the power to issue the writ of *mandamus* to a district court, no tribunal exists, or can be created by the legislature, by which such power may be exercised; and the existence of it in this court is, consequently, not only compatible with the organization of the judiciary of the state, but without it the system would be imperfect beyond any remedy except a change in the constitution.

The question, which we have thus briefly considered, was not discussed at the bar, and we have not had the benefit of the learning of counsel, but it is necessary that it should be settled; and we have determined that the power does exist in this court to issue writs of *mandamus* to the district courts.

The power existing, the next point for consideration is whether the papers before us present a proper case for the exercise of that power. This involves two questions: first, as to the validity of the order; and secondly, as to the appropriateness of the remedy by *mandamus*.

First: Was the order properly made, and a valid determination of the court, which ought not to be disturbed? It does not appear that it was made as a punishment for contempt, and if it were intended as such it could not be supported. The 13th section of the act organizing the district courts prescribes fine and imprisonment as a punishment for contempt, and this express provision must be taken as exclusive of all other modes of punishment. Viewed as an adjudication for a contempt, the order is invalid, for inflicting a punishment different from that warranted by the statute, the same as it would have been, had it imposed a heavier fine or sentenced to a longer imprisonment than the statute authorizes. Besides, it is not usual for a court to interpose by a proceeding for contempt against an attorney for any act independent of his profession; and it ap-

pears both from the order itself and from the affidavits, that the offences charged against these parties were not connected with their professional employment as attorneys. The order should, therefore, be regarded as the exercise of a power inherent in every court, which has the authority to admit attorneys to practice, of striking their names from the rolls, or, as the order expresses it, of expelling them from the bar, whenever they are guilty of such conduct, either in or out of their profession, as shows them to be unfit persons to practice it. But where an attorney is proceeded against with this object, he is entitled to have notice of the charges against him, and an opportunity to make his defence. This is not only the dictate of natural justice, and the uniform practice in such cases, but it has been carried into an express adjudication in *ex parte Heyfron*. (7 *How. Miss. Rep.* 127.) In the case at bar, no notice of the charges upon which the order was made was given; no opportunity for explanation, apology, or defence was afforded; the judgment of the court was *ex parte*, and condemned the defendants without a hearing. It is barely necessary to add, that a judgment thus rendered, partaking so strongly of the nature of a criminal proceeding, and so serious in its consequences, cannot be supported.

Secondly: Is the proceeding by *mandamus* the proper means by which the error may be rectified? According to the passage above cited from *Blackstone's Commentaries*, this writ is used as an instrument to restrain the excesses of inferior tribunals, and obviate their denial of justice; and the commentator, in enumerating the cases in which it may be issued, says, (3 *Comm.* 110.) that "It lies to compel the admission or *restoration* of the "party applying to any office or franchise of a public nature, "whether spiritual or temporal; to academical degrees; to the "use of a meeting house, &c.; for the production, inspection, or "delivery of public books and papers; for the surrender of the "regalia of a corporation; to oblige bodies corporate to affix "their common seal; to compel the holding of a court; and for "an infinite number of other purposes which it is impossible to "recite minutely." From the general nature and character of

the writ, and the specification of the cases in which it lies, as thus laid down, it would seem not to be extending it beyond its appropriate office to apply it in the present case. But it will not lie, if the applicants have another specific and adequate legal remedy, nor if the effect of it would be to interfere with the exercise of the discretionary powers of the court. That there is no other specific and adequate legal remedy is too apparent to admit of controversy, or to require any farther consideration here. Would the issuing of it interfere with the discretionary power of the court? We think not. An attorney, by his admission as such, acquires rights, of which he cannot be deprived, at the *discretion* of a court, any more than a physician of the practice of his profession, a mechanic of the exercise of his trade, or a merchant of the pursuit of his commercial avocations. It is true, that, being officers of the court, attorneys are in many respects subject to the orders of the court, but these orders must be the result of sound and legal, and not of arbitrary and uncontrolled discretion. A *mandamus* to the district court to vacate this order would not be an interference with the discretionary powers of that court.

A similar case has been before the supreme court of New York and decided. In the *People* v. *The Judges of Delaware Co.* (1 *Johns. Cas.* 181,) a *mandamus* was issued to the court of common pleas, commanding them to restore an attorney who had been removed by them. A peremptory *mandamus* will, therefore, issue in this case to vacate the order in question, and to reinstate the applicants as attorneys and members of the bar of the eighth judicial district. An alternative *mandamus*, in the first instance, we do not deem necessary. Notice of this application having been given, and copies of the papers served, the court may award either an alternative or peremptory *mandamus*, according to the nature and exigency of the case; and in both these respects we think it proper that a peremptory writ should go in the first instance.

Ordered accordingly.

THE PEOPLE, *ex. rel.* STEPHEN J. FIELD *vs.* TURNER, The Judge of the Eighth Judicial District.

Every court has, while engaged in the performance of its lawful functions, as an incident to its judicial character, the authority to preserve order, decency and silence in its presence; and in such case, may apprehend and punish an offender without further examination or proof; but where the offence is committed out of court, the party is entitled to notice and to a hearing in his defence.

An order of court, adjudging a party guilty of contempt, should always show upon its face, the facts upon which the exercise of the power is based, and the adjudication is made.

Where error has occurred in proceedings, either civil or criminal, which cannot be reached by a writ of error, the writ of *certiorari* is a proper remedy to correct such error, unless some other statutory remedy has been given.

This court may issue a writ of *certiorari* to a district court for the purpose of reviewing summary proceedings, in a case where no appeal would lie.

Where an order was made by the district court of the eighth judicial district, whereby A. was ordered to be imprisoned forty-eight hours, and fined five hundred dollars, for contempt of court, without setting forth any of the facts whereon the order was based; *Held*, that a *certiorari* should issue to remove the proceedings for review into this court: and *held further*, that a *mandamus* was not a proper remedy in such a case.

Where a party in his notice of motion served on the adverse party, asks for a specific relief, *or for such other or further order as may be just;* the court may afford any relief compatible with the facts of the case presented.

THIS was an application for a *mandamus* to the district court of the eighth judicial district to vacate an order punishing the relator for contempt. The only facts material in the case are stated in the opinion of the court.

Stephen J. Field, in *propria persona.*

By the Court. BENNETT, J. At a term of the district court of the eighth judicial district for the county of Yuba, held on the 7th day of June last, the following order was made: "Ordered, that Stephen J. Field be imprisoned forty-eight "hours and fined five hundred dollars for contempt of court." An application is now made for a mandamus to vacate this

order, "or for an order perpetually staying the execution of "said order, or for such other or further order as may be just." Notice of the application has been duly given, and copies of the papers upon which it is founded, served.

We have determined, in the case of *Mulford*, that this court has the power to issue the writ of *mandamus* to a district court. The point for our present consideration, therefore, is whether this case be a proper one for the exercise of that power. The order now under review shows upon its face that it was intended as an adjudication for a contempt, and this raises the question of the extent of the power of punishment for contempt, and the rules which should be observed in enforcing it.

By the common law every court has, while engaged in the performance of its lawful functions, as an incident to its judicial character, the authority to preserve order, decency and silence, without which no court could vindicate or support the laws intrusted to its administration. The power thus vested in a court is necessarily of an arbitrary nature, and should be used with great prudence and caution. A judge should bear in mind that he is engaged, not so much in vindicating his own character, as in promoting the respect due to the administration of the laws; and this consideration should induce him to receive as satisfactory any reasonable apology for an offender's conduct. The case of *Lining* v. *Bentham*, in the constitutional court of appeals of South Carolina, (2 *Bay's Rep.* 1,) contains an accurate exposition of the light in which this power is viewed. Bentham, a justice of the peace, had committed Lining for a contempt for the use of insulting and abusive language in open court. Lining sued the justice for false imprisonment and proved upon the trial that the facts set forth in the commitment were untrue, and a verdict was taken for the plaintiff. But the court of appeals set aside the verdict and determined that the commitment drawn up by the justice was conclusive evidence in his favor, and that the justice was not amenable in an action for a judicial act of this nature, but only on an indictment for oppressive or corrupt conduct. And the court remark, that one general principle, incidental to all courts, as well inferior as su-

perior, was a power to commit for contempt, either by word or deed, offered in the presence of the judge and in the face of the court, and that this power was not against *magna charta* or the law of the land, but formed a part of the common law.

But whilst the power to punish for contempt is thus arbitrary and conclusive, it by no means follows that every act which a court declares to be a contempt is in reality one. Thus in *ex parte Thatcher*, (2 *Gil. Rep.* 167,) the clerk of the court had been removed, and another person appointed in his place, and the one removed had appealed from the order depriving him of the office. The court thereupon made another order requiring the first clerk to give up the books of his office to his successor. To this order obedience was refused, and the court thereupon adjudged the offender guilty of a contempt and committed him to prison. But it was held, that the appeal taken from the order of removal operated as a *supersedeas*; that the second clerk was improperly appointed; that there could have been no contempt in refusing obedience to the order requiring a delivery of the books; and that, although the court had power to punish for a contempt in proper cases, yet the facts not being such as could constitute a contempt, the order of commitment and the imprisonment under it, were both illegal and void.

The case of *Lining* v. *Bentham*, in no respect conflicts with *Thatcher's* case. In the former, the subject matter was such that the power of the court to punish for contempt could properly attach. Its judgment was, therefore, final and conclusive, not only as to the truth of the facts, but as to the construction to be placed upon them. In the latter, the facts upon which the order of commitment was based, were of such a nature as to preclude the idea of a contempt being predicated of them; and, therefore, the judgment was not conclusive, but was subject to be reviewed. It would, indeed, be a monstrous proposition, that a court could, by adjudging an innocent and legal act to be a contempt, thereby preclude the possibility of review, and fine and imprison *ad libitum*. A distinction exists between the two classes of cases, and a distinction should be made in the applica-

tion to them of the rules of law in relation to the conclusiveness of adjudications for contempt.

The 13th section of the act organizing the district courts, which is but declaratory of the common law, enacts "that such "courts shall have power to punish in a summary manner, by "fine and imprisonment, or either, for contempts offered to them "while in session, or to any process, writ, rule, or order of said "courts issued and made, or for disobeying any writ, process "or order thereof, or for obstructing or preventing the execu-"tion of the same, and that the judgments, decrees, and de-"terminations of said courts in such cases shall be final and "conclusive." It will be observed that this statute, in carrying out the doctrine of the common law, provides for two different classes of contempts; the one class, consisting of such contempts as are committed in the presence of the court during its session; and the other class, of such contempts as are committed out of court. The method of proceeding in the punishment of these two classes of contempts is different. In the former, the offender may be instantly apprehended and punished without any further examination or proof. But in the latter, which consist of matters arising at a distance, and of which the court cannot have a perfect acquaintance, or take judicial knowledge, the proceeding must be in a different way, and the party accused is entitled to be heard in his defence. (4 *Black. Comm.* 286.)

We think it follows from the distinctions above considered, that the final order of the court, by which a party is adjudged to have been guilty of a contempt, should always show, upon its face, the facts upon which the exercise of the power is based, and the adjudication made. This is certainly the general, if not the uniform practice. But the order in question does not set forth any facts, nor even show whether the proceeding was for an offence committed in the presence of the court, or at a distance from it. We are under the impression that it is, in this respect, imperfect; but it is unnecessary to express, at the present time, a definitive opinion upon this point; for we do not conceive that a *mandamus* would, in any event, be a proper

remedy. This case differs from *Mulford's* case. In that, the applicants having been "expelled from the bar," asked to be restored. In this, it is sought merely to reverse a judgment of the court. The *mandamus* must, therefore, be refused.

But the applicant asks, in his notice of motion, for such other order as may be just. We deem it proper to award a writ of *certiorari*, requiring the district court to certify the record to this court. The act of the legislature organizing this court empowers it to issue this writ in proper cases; and the argument in support of the constitutionality of the power proceeds *pari passu* with that in support of the power to issue the writ of *mandamus*. (*See Mulford's case.*) The writ of *certiorari* is used, at common law, for the purpose, amongst other things, of removing summary proceedings, and the order made thereon, from an inferior tribunal into the court of king's bench, where such proceedings and order may be either quashed or confirmed. (4 *Black. Comm.* 272, 320.) And this writ sometimes lies in cases, which the inferior jurisdiction is empowered *finally* to hear and determine. (2 *Haw. P. C.* 286; *Rex* v. *Morely*, 2 *Burr.* 1040; *Hartley* v. *Hooker*, *Cowp.* 524.) As a general rule, at common law, where error has occurred in proceedings, either civil or criminal, which cannot be reached by a writ of error, the writ of *certiorari* is a proper remedy to correct such error, unless some other statutory remedy has been given. A *certiorari* will, therefore, issue returnable at the next term of this court; and in the mean time all proceedings upon the order will be stayed upon the applicant's executing and filing with the clerk of the county of Yuba a bond, in the penalty of one thousand dollars, with two sureties who shall justify by affidavit in double that amount, conditioned that the applicant shall abide the final decision of this court.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA,

IN DECEMBER TERM, 1850.

Ex parte The Queen of the Bay *et al.*

Where five females are brought before the court on return to a writ of *habeas corpus*, and the person in whose custody they are, neither shows nor claims any legal right to detain them, they will be discharged.

The petition of Alexander Rose, praying for a writ of *habeas corpus*, represented that for two years last past he had been a resident of the island of Dominick, one of the group of the Marquesas Islands, and was well acquainted with the people thereon; that sometime in July or August, 1850, the American schooner *Jupiter*, whereof one Snow was master, arrived at the island, and remained there for several weeks, and that the petitioner shipped on said schooner, as a mariner, for the port of San Francisco; that while the schooner was at the island of Dominick, the master and the mate of the schooner induced five females, one of whom was the "Queen of the Bay," about fourteen years of age, and the others, who were "daughters of chiefs," to go on board the schooner by some false pretext, and soon after they came on board, set sail, and forcibly and against the will of said females, brought them to the port of San Francisco; that during the voyage they were treated with great cruelty, and after their arrival, were

treated still worse, and to such a degree that all of them jumped overboard, but were saved from drowning, and again taken on board; that soon thereafter the schooner sailed for Stockton, still detaining the women on board, forcibly and against their will, where they still continued to be detained against their will; that the petitioner well knew the names of the females, but could not give their names in English, nor in their native language, so as to be understood. He, therefore, on behalf of the females, prayed that a writ of *habeas corpus* might issue to bring them before the court. The writ was issued, and they were brought up; and Captain Snow, not pretending to have any legal right to detain them, they were discharged; and were subsequently sent back to their own country by James Collier, Esq., collector of the port of San Francisco.

James Collier, for the petitioner.

By the Court, Bennett, J. There appearing to be no cause for the detention of the "Queen of the Bay," and "the daughters of the chiefs," they are, consequently, discharged from the custody of Captain Snow.

GROGAN & LENT vs. RUCKLE.

4 Cal. R. 201

In an action on a promissory note by a special endorsee against the maker, the plaintiff must prove at the trial the genuineness of the endorsements, although the defendant has not denied their genuineness under oath.

The defendant Ruckle executed his promissory note on the 1st day of January, 1850, whereby he promised to pay on demand to Richard M. Harmer, or order, $1000, with eight per cent. per month interest until paid. The note was afterwards transferred by Harmer, and endorsed by him, as follows: "Pay "to the order of Dr. Wm. H. McKee;" and was subsequently transferred by McKee, and endorsed by him, as follows: "Pay "Alexander G. Grogan and William M. Lent." To the com-

plaint, which was in the ordinary form of a declaration on a promissory note, the defendant pleaded the general issue, but did not annex to his plea an affidavit denying the genuineness of the endorsements, and did not, in any other way, deny their genuineness under oath. At the trial, the counsel for the defendant insisted that the plaintiffs could not recover without proving the endorsements, but the court ruled otherwise, and the defendant excepted. Judgment having been rendered against the defendant, he brings this appeal.

R. A. Lockwood, for plaintiffs.

John Curry, for defendant.

By the Court, HASTINGS, Ch. J. This action was brought by respondents as endorsees and holders of a promissory note, executed by appellant in favor of one Richard M. Harmer, and by him endorsed to one William H. McKee, and by McKee endorsed to plaintiffs; and the only question submitted is, whether it was necessary, on trial, to prove the endorsements. The 62d sec. of the Practice Act provides, that "when any "complaint or answer is founded on any instrument of writing "which is alleged to have been signed by the party, the signa- "ture shall be considered as admitted, unless denied by such "party on oath. If denied, it may be proved by any proper "evidence." The endorsers are not parties to this action. The maker is a party. If the action had been instituted against the endorsers it would be competent for them to deny the endorsement on oath, and in such case it would not be necessary to prove the endorsement unless so denied. "This statute is "an encroachment on the common law, and should not, there- "fore, be extended beyond the fair import of its terms. Be- "sides, the defendant must be presumed to know whether he "has signed the note himself, and may therefore be reasonably "required to make the affidavit denying the signature. But he "cannot with so much justice be called on to deny the en- "dorsement in the same manner, or else to admit its genuine-

"ness." (*Hardman* v. *Chamberlain*, *Norris' Iowa Rep.* 104.) The plaintiff should have proved the genuineness of the endorsements before the note was given in evidence on trial. The legislature evidently intended that a party *charged* with the execution of an instrument should not put the plaintiff to the necessity of proving the signature, unless denied, on oath. The judgment, therefore, of the district court will be reversed, and the cause remanded.

Ledley *vs.* Hays, Sheriff, &c.

In an action against a sheriff for seizing under execution property belonging to a person other than the judgment debtor, where the recovery is resisted on the ground that the property levied upon had been transferred to the plaintiff by the judgment debtor, in fraud of his creditors, and conflicting evidence is given at the trial as to the question of fraud, but the plaintiff is nonsuited on another ground; this court, in determining whether the nonsuit was properly ordered, will presume that the plaintiff's title was not tainted with fraud, inasmuch as, there being conflicting evidence on that subject, the plaintiff had a right to have the question submitted to the jury.

In an action by A. against a sheriff, for seizing the property of A. on an execution against B. *Held*, that no demand was necessary before bringing suit.

Appeal from the district court for the fourth judicial district. The facts are stated in the opinion of the court.

C. A. Whitcomb, for the plaintiff.

N. Holland, for the defendant.

By the Court, Bennett, J. This was an action of replevin for taking and detaining personal property of the plaintiff. The defendant, as sheriff of the county of San Francisco, seized upon a wagon and team as the property of one Elliott, under an execution against him, and whilst he had them in his charge and custody. At the time of the seizure, Elliott informed the

defendant that the plaintiff owned the wagon and team and that he (Elliott) had no interest in them. The plaintiff was nonsuited at the trial on the ground that a demand was necessary before suit brought, and this presents the only point for consideration.

The defense was based upon the ground that Elliott had transferred the wagon and team to the plaintiff in fraud of his creditors, and that, the defendant having levied upon the property while in the charge of Elliott, a demand should have been made before bringing suit. On the question of fraud conflicting evidence was given, which was proper to have been submitted to the jury to pass upon, and we must, therefore, in determining this question of nonsuit, assume that the property was owned by the plaintiff, and that Elliott was, as the plaintiff claims him to have been, a mere servant.

The possession of a servant is the possession of the master for the purpose of maintaining trespass; (1 *Chitty's Pl.* 194;) and the same rule applies in an action of replevin in the *cepit.* (*Barrett* v. *Warren*, 3 *Hill*, 348.) The plaintiff must, therefore, be deemed to have been in the possession of the property at the time of the levy, and, the sheriff having had notice that the wagon and team were owned by the plaintiff, the original taking was tortious, and no demand was necessary before bringing suit.

In *Acker* v. *Campbell*, (23 *Wend.* 371,) an action of replevin in the *cepit* was sustained against a sheriff without any previous demand. In that case, goods had been sold and delivered by the plaintiffs to one Hooker, and the sheriff levied upon them while they were in the possession of the latter under an execution against him. It was established that the goods were procured of the plaintiffs through fraud; and although the sheriff took them out of the possession of Hooker, it was nevertheless held, that he was liable to the plaintiffs in an action of trespass, or of replevin in the *cepit*, in neither of which actions is a previous demand necessary. We understand it to be law, that the sheriff is liable in either form of action, without a previous demand, even where, by mistake, he takes the goods of a wrong person

under an execution; (1 *Chitty's Pl.* 197;) and much more must this rule apply where the officer is informed that the goods are owned by a third person.

New trial granted, costs to abide the event.

SOUTER *vs.* THE SEA WITCH.

An act of the legislature authorized the issuing of attachments against boats and vessels "used in navigating the waters of this state;" and *held*, that the *Sea Witch*, which belonged to the port of New York, was intended for the New York and China trade, had been in the harbor of San Francisco but a few days, and was never otherwise *used in navigating the waters of this state* than by sailing into the harbor of San Francisco from the ocean, was not, within the meaning of the statute, a boat or vessel *used in navigating the waters of this state.*

Where a statute provides a remedy not known to the common law, and by which no personal notice to the person proceeded against is required, the statute should receive a strict construction and not be extended to cases which do not clearly fall within its language. *Per* BENNETT, J.

A statute should be construed so as to give effect and meaning, if possible, to every clause and word contained in it. *Per* BENNETT, J.

APPEAL from the superior court of the city of San Francisco. The proceeding was commenced under an act of the legislature passed April 10, 1850, providing for the collection of demands against boats and vessels, by which any person having a demand belonging to one of four different classes enumerated in the statute, might, at his option, instead of proceeding against the master, agent, owner, or consignee, institute suit against the boat or vessel by name, and have a warrant of attachment against her, her tackle, apparel, and furniture. The demand of the plaintiff belonged to one of the classes enumerated in the statute; and the superior court held that the *Sea Witch* was a vessel *used in navigating the waters of this state*, and gave judgment against her for the amount of the plaintiff's demand, from which judgment an appeal was taken to this court.

The point on which the judgment was reversed by this court was, that the *Sea Witch* was not a " vessel used in navigating " the waters of this state," within the meaning of that phrase in the statute; and so far as that point is concerned, the facts are sufficiently stated in the opinion of the court.

John A. McDougal, (attorney general,) for the plaintiff.

M. H. McAllister, for the defendant.

By the Court, BENNETT, J. This was a proceeding under the " act providing for the collection of demands against vessels " and boats." The first section enacts that " every boat and " vessel used in navigating the waters of this state" shall be liable to be proceeded against by attachment, in the manner prescribed.

The *Sea Witch* belonged to the port of New York, was a transient ship, had been in the harbor of San Francisco but a few days, and was intended for the New York and China trade. She was never otherwise used in navigating the waters of this state than by sailing into the harbor of San Francisco from the ocean. The question is, whether she is one of that class of vessels designated in the act. We think she is not.

The remedy given by the act, being strictly a statutory remedy, and of a character not recognized by the common law, and requiring no personal notice to the person proceeded against, ought not to be extended to cases which do not clearly fall within the language of the statute. Courts hold that such statutes should be strictly construed. (2 *Cow. Rep.* 419, 420; 15 *Mass. Rep.* 205, 206.)

If a ship whose employment is on the high seas, because she enters the harbor of San Francisco, is to be considered as belonging to the description of vessels mentioned in the statute, then every vessel that may, from any cause, be found upon waters within the territorial limits of the state, must be embraced within the meaning of the act. But such construction would, under the words " used in navigating the waters of this state," be sense-

less and nugatory. The meaning of the statute would be the same without them as with them. If the legislature had intended that the provisions of the statute should be extended to such a case as the present, they would have said in general terms, that every boat and vessel should be liable, or that every boat and vessel found upon the waters of this state should be liable, without using the restrictive language which they have employed. We see no possible way, in which any force or effect can be given to the clause under consideration, if the statute can be extended to this case. It is, however, a well settled rule of interpretation, that a statute must be construed so as to give effect and meaning, if possible, to every clause and word. That vessels which are confined in their usual and substantial employment to interior navigation, are the only boats and vessels embraced within the descriptive words of the statute, seems to be an interpretation plain and intelligible, which neither enlarges nor limits the object and meaning of the act. And such, we doubt not, was the intention of the legislature. They meant by these words to limit the operation of the act, so as to avoid a conflict between the state and federal authorities as to jurisdiction of actions concerning maritime contracts and maritime torts.

In the *Steamboat Orleans* v. *Phoebus*, (11 *Peters*, 175,) it was decided, that the admiralty had no jurisdiction over a vessel not engaged in maritime trade and navigation, though on her voyages she may have touched at one *terminus* of them in tide water, her employment having been substantially on other waters, and that the true test of the admiralty jurisdiction was, whether the vessel was engaged, substantially, in maritime navigation or in interior trade, not on tide waters. In that case the steamboat, although the *terminus* of her voyage was upon tide water, was used exclusively in trade and navigation upon the waters of the Mississippi and its tributary streams, and was not employed or intended to be employed in navigation or trade on the sea or on tide waters, and it was held that the admiralty jurisdiction did not attach. In the case before us the *Sea Witch*, although her *terminus* was upon waters within the territorial

limits of this state, was employed exclusively in trade and navigation upon the high seas, and was not used or intended to be used in navigation upon the interior waters of the state. The admiralty jurisdiction of the federal courts would consequently extend over her—with which jurisdiction it was the intention of the legislature to avoid all conflict.

We think that the *Sea Witch* was not a "vessel used in navigating "the waters of this state" within the meaning of the attachment act, and the judgment should therefore be reversed.

Ordered accordingly.

McQueen *vs.* The Ship Russell.

Where a bond was given in pursuance of section 8 of the act, passed April 10, 1850, providing for the collection of demands against boats and vessels, for the discharge of the vessel, in a case where the vessel was not liable to be attached under the act; *Held*, that judgment rendered against the principal and sureties in the bond was erroneous, on the ground that a bond given for the release of a vessel, when the vessel was not liable to seizure under that act, was invalid.

Appeal from the superior court of the city of San Francisco. The facts in this case were in all respects, so far as concerns the liability of the ship *Russell*, under the Attachment Act of April 10, 1850, the same as in the case of the *Sea Witch*. (*ante*, 162.) Judgment having been rendered in the superior court in favor of the plaintiff, an appeal was taken, and the judgment reversed by this court, on the ground that the case was controlled by the decision in *Souter* v. *The Sea Witch*. A petition was then presented for a re-hearing, and the matter was argued by

Allen T. Wilson, for plaintiff, and

John Curry, for defendants.

By the Court, Bennett, J. It was decided in the case of the

Sea Witch, (*ante*, *p.* 162,) that the act of April 10, 1850, providing for the collection of demands against vessels and boats, did not apply to such a case as the present. It is claimed, however, on this application for a re-hearing that, in consequence of a bond having been given under section 8 of the statute, the court below thereby acquired jurisdiction over the subject matter, and was authorized to pronounce the judgment rendered in this cause. The sections of the statute upon which the plaintiff relies, are as follows:—

"Sec. 8. If the master, agent, owner, or consignee, shall, before final judgment in any suit instituted by virtue of this act, give bond to the plaintiff with sufficient security, to be approved by the court, or the judge or clerk thereof in vacation, conditioned to satisfy the amount that shall be adjudged to be due and owing to the plaintiff upon the determination of the suit, together with all costs accruing, said boat or vessel, with the tackle, apparel, and furniture belonging thereto, shall be discharged from further detention.

"Sec. 9. If judgment shall be rendered against any boat or vessel, in favor of the plaintiff, the court shall make an order, directed to the sheriff, commanding him to sell such boat or vessel, together with its tackle, apparel, and furniture, to satisfy the judgment, and all costs that may have accrued in the cause; which order shall be executed and returned in the same manner as executions.

"Sec. 10. If bond and security shall have been entered into, according to the 8th section of this act, and judgment shall have been rendered in favor of the plaintiff, execution shall be issued for the amount of the judgment and costs, in favor of the plaintiff, against the principal and security in such bonds."

The amount of these sections is nothing more than this, that, when a bond shall be given, the vessel shall be released, leaving the suit to proceed in the same manner as it would have proceeded, in case the vessel had remained under seizure. The judgment is spoken of as one in favor of the plaintiff: but a judgment against what, or whom? Clearly against the vessel, the only party defendant in the proceeding, and not against ei-

ther the principal or sureties in the bond; and *judgment* having thus been rendered in favor of the plaintiff *against the vessel* attached, *execution* may, by the express authority of the statute, issue against the principal and sureties in the bond. The judgment appealed from in this case, is therefore against the vessel, or it is not a judgment authorized by the statute; in the latter event it must necessarily be reversed, and in the former case the same result must follow under the decision in the case of the *Sea Witch.* The ship *Russell* not having been liable to seizure by the provisions of the act, the bond given to release her can be of no effect, for the reason, that it cannot be enforced until judgment has been finally rendered against the ship. Although I entertained, in the outset, considerable doubts upon the point under review, I am satisfied, upon a careful examination, that the above is the proper construction to be given to the statute. The motion for a re-hearing should consequently be denied.

Ordered accordingly.

ROWE *vs.* CHANDLER & DENNISON.

Where two persons are sued jointly upon a joint contract, judgment may be rendered in favor of the plaintiff against one of the defendants, and in favor of one of the defendants against the plaintiff. Thus, where A. sued B. & C., as partners, and the misjoinder was not set up in the answer, and the plaintiff's demand was proved against B., but not against C., and verdict and judgment were given in favor of the plaintiff against B. and in favor of C. against the plaintiff; on appeal, the case was affirmed.

The case of *Merrifield* v. *Cooley*, (4 *How. Pr. Rep.* 272,) overruled.

Under the Practice Act of 1850, the rules of the old system of pleading and practice, whether legal or equitable, should be applied, irrespective of former technical distinctions, to *all* actions under the new system, where they may be properly applied, and are not inconsistent with statutory provisions. *Per* BENNETT, J.

APPEAL from the superior court of the city of San Francisco. The point on which the judgment of the court is based, is suffi-

ciently stated in the opinion of the court. The cause was twice argued. On the first argument, the court, taking for its guide the case of *Merrifield* v. *Cooley*, (4 *How. N. Y. Pr. Rep.* 272,) reversed the judgment of the superior court. The opinion was delivered by BENNETT, J., as follows:

"The action was brought against the defendants Chandler & "Dennison upon an alleged joint indebtedness. Process was "served on both of them; but the plaintiff, at the trial, failed "to prove a joint liability against both defendants. He did, "however, make out a cause of action against one of the de-"fendants, and a verdict was taken, and judgment rendered, in "favor of one defendant and against the other. This was "erroneous. (*Merrifield* v. *Cooley*, 4 *How. Pr. Rep.* 272.)

"At the common law, in an action against two or more de-fendants upon an alleged joint undertaking or contract, the "judgment must be against all the defendants, or in favor of all. "In such case, if the plaintiff fail, at the trial, to establish a "joint contract or undertaking, all the defendants are entitled "to verdict and judgment, though it be proved that one of "them would have been liable had the suit been brought "against him alone. Judgment reversed."

The plaintiff moved for a re-hearing, which was granted; and the cause was again argued by

Edward Norton, for the plaintiff, and

John Chetwood, for the defendant.

By the Court, BENNETT, J. The complaint alleges an indebtedness by the defendants as partners. The answer denies the indebtedness. At the trial, the plaintiff made out a cause of action against the defendant, Chandler, but failed to establish a *joint* indebtedness of both defendants. The jury brought in a verdict in favor of Chandler and against Dennison, and judgment was rendered in accordance with such verdict. The question is thus presented, whether, if, in an action on contract against two or more defendants, the plaintiff fails to make out

the *joint* liability of all, he may take judgment against one or more, who are proved to be liable.

The point is to be determined under the provisions of the Practice Act of this state, which, so far as this question is affected, is, in substance, and for the most part literally, a transcript of the Code of Procedure of the state of New York. Under that code it has been held by one of the justices of the supreme court of New York in the case of *Merrifield* v. *Cooley*, (4 *Howard's Pr. Rep.* 272,) in an action, like the present one, against several defendants to recover damages for the breach of a contract, that the plaintiff must recover against all the de-defendants, or none. Our former decision in this cause was in accordance with the doctrine of *Merrifield* v. *Cooley;* but, on a rehearing, and after elaborate arguments by counsel on both sides, we have come to the conclusion that the decision in *Merrifield* v. *Cooley*, and our former decision, are both wrong.

It is not disputed that, at common law, as a general rule, where a party brought his action upon a contract against two or more defendants, he was obliged to make out a cause of action against all the defendants, or he could recover against none. (1 *Chitty's Pl.* 34; *Mannahan* v. *Gibbons*, 19, *J. R.* 109.) This general rule was, however, subject to several exceptions. Thus, if one of the defendants, after the making of the contract, had received his discharge in bankruptcy, although the practice in England required all the joint contractors to be sued, (*Bevil* v. *Wood*, 2 *Maule & Selw.* 23,) yet judgment might be rendered in favor of the person so discharged, and against the others. (1 *Chitty's Pl.* 35; *Camp* v. *Gifford*, 7 *Hill*, 169.) So also, contrary to the English practice, (1 *Chitty's Pl.* 51,) it has been held in New York and Massachusetts, that where one of several defendants establishes his infancy at the time of making the contract, judgment may be rendered in his favor, and against the other defendants. (*Hartness* v. *Thompson*, 5 *J. R.* 160; *Woodworth* v. *Marshall*, 1 *Pick. Rep.* 500.) In the cases last cited, the court seems to have considered the question rather as a matter of practice, to be decided upon convenience and policy, than as a matter of principle.

It was settled law, under the old system of practice, that where one of several joint contractors was sued, the plaintiff might proceed and take judgment against him, unless he interposed a plea of non-joinder in abatement; (1 *Chitty's Pl.* 52, 53;) whereas, in case too many persons were made defendants, it was a fatal defect, according to circumstances, upon demurrer, motion for nonsuit at the trial, motion in arrest of judgment, or writ of error. (*Id.* 50.) Under that system, it was, therefore, necessary, to plead non-joinder in abatement, or the defendant was deemed to have waived all objection, but it was not necessary to plead mis-joinder in abatement, and a defendant might take advantage of this defect at any stage of the proceedings. This distinction proceeded upon the ground, that the law held the plaintiff under no obligation to know that he had not joined a sufficient number of persons as defendants in the suit, and that the person sued must come in and inform him of the defect by plea in abatement, and give him a better writ; but that he was bound to know that he had joined too many persons, and that neither defendant was obliged to give him any information on the subject until after it was too late to correct the mistake. Thus, A. is doing business under the name and firm of A. & Co., and B. is a member of the firm. There is an indebtedness of the firm, upon which suit is brought against A. alone. Now, the old system says, that the plaintiff is not bound to know that B. was a joint contractor, and that A., if he wishes to have B. joined with him in the suit as a co-defendant, must, at an early stage of the proceedings inform the plaintiff of the error into which he has run, in order that he may be enabled to correct it. At the same time, if B. were, in truth, not a partner with, but a clerk or servant of A., then the plaintiff must know that fact; and if a suit were brought against them jointly on an indebtedness of A. & Co., neither A. nor B. would be under any obligations to raise the objection and have the mistake corrected in the outset, but might permit the suit to proceed to trial and then avail himself of the mis-joinder. Now it would seem that, if the plaintiff is bound to know the number and names of the persons who had contracted with him,

so as not to excuse him for joining too many, he ought equally to know the number and names of the persons who had contracted with him, so as not to excuse him for joining too few—that if, in the one case, he be required to know who ought to be made defendants, he should be equally bound to know the same thing in the other case. And it strikes us as reasonable, that, if a defendant be required to plead a non-joinder in abatement, or be deemed to have waived it, he should, at the same time, be required to plead a mis-joinder in abatement, or be deemed to have waived it, and to subject himself to a judgment, in case the indebtedness in the complaint be proved against him alone.

There is nothing in the form or substance of the old plea of the general issue, which can distinguish the two cases. If it be said, that, by the plea of the general issue in an action against two or more, they deny the joint indebtedness where the debt was contracted by one of them, so it may, with equal propriety, be urged in an action against one, where in truth the contract was made by two or more, that the plea of the general issue denies the separate indebtedness. Indeed, the distinction adverted to seems to be one of those arbitrary and unmeaning rules, which disfigure the body of the common law, and which, in many cases, disturb, and, in some, entirely divert, the course of justice.

In *Minor et al* v. *The Mechanics' Bank of Alexandria*, (1 *Peters*, 46,) the strictness of the common law practice was relaxed still further than it had been in *Hartness* v. *Thompson*, and *Woodworth* v. *Marshall*. It was held in that case, that, though on a joint and several bond the plaintiff might sue one or all of the obligors, and, in strictness of law, could not sue an intermediate number—that he must either sue all, or not more than one—yet, if there was error in this respect, it could be taken advantage of only by plea in abatement, and was waived by pleading to the merits. Mr. Justice Story says, in that case, that the authorities proceeded upon the ground, that the question was matter of practice, to be decided upon considerations of policy and convenience, rather than matter of absolute principle, and that the court was left at full liberty to

entertain such a decision as its own notions of general convenience, and legal analogies, would lead it to adopt; and he adds that, "in the administration of justice, matter of form, not "absolutely subjected to authority, may well yield to the substantial purposes of justice."

It is matter of every day practice in courts of equity to add or strike out parties, to render a decree against some defendants, and in favor of others; and, in actions at law sounding in tort, it is always permitted to take judgment against such of the defendants as are proved to be guilty of the wrong, while judgment of acquittal may be rendered in behalf of others. In some cases, such as actions against common carriers, where the cause of action in reality arises out of contract express or implied, the plaintiff has his election to found his action on the contract, in which case the strict rules of non-joinder and mis-joinder are applied; or to bring his action on the case, founded on the breach of duty imposed on the defendants by law, and sounding in tort, in which case it matters not whether he joins too many or too few persons as defendants, for in either event he takes a verdict and judgment against so many as he proves to be liable, and has a verdict and judgment rendered against him in behalf of those who are not proved to be guilty of the grievances complained of. So also, where an action is brought against one of two joint contractors, and a plea in abatement of non-joinder is put in by the defendant, and judgment given thereon in his favor, and a fresh suit is brought against him and the person whose non-joinder was pleaded in abatement, here, if, on the trial, there be not sufficient proof to establish the joint liability of the person last brought in, he shall have judgment in his favor, but the verdict and judgment shall, nevertheless, be given against the other defendant, if the proof establish his sole liability.

It must be confessed that it is difficult to perceive any solid reason, why the same rule which is applied in equity should not be adopted at law—why a mis-joinder should have any other effect than a non-joinder—and why either should be more fatal in an action at law on contract, than in an action at law in tort

—why an action against common carriers, when called assumpsit, should be subject to rules, and be followed by consequences, differing from those which apply in an action against the same defendants, and based upon the same facts, but which is denominated an action on the case—why, if judgment may be rendered in favor of one defendant and against another in an action on contract, where a plea of non-joinder has been interposed in a former suit, the same thing may not be done in case of misjoinder, where the substantial purposes of justice require it, and where the defendants have neglected to raise the proper objection at the earliest opportunity.

We have thus adverted to some of the distinctions in the old system of practice, and have noticed that there was not in any of them any "matter of absolute principle," but that they were rather "matters of practice decided upon considerations of "policy and convenience."

We will now direct our attention to the late sweeping reforms, or at least changes, which have been introduced in pleading and practice. The first section of the Practice Act of this state, which is taken from the 62d section of the *Code of Procedure of New York*, reads as follows: "There shall be in this state "hereafter but one form of action for the enforcement or pro-"tection of private rights and the redress of private wrongs, "which shall be denominated a civil action." By this section, all distinction between actions at law and suits in equity, and between the forms of such actions and suits, was abolished.

Mr. Justice Wells says in *Merrifield* v. *Cooley*, (4 *Howard Pr. Rep.* 274,) that he is prepared to hold that the rules of law in force at the passage of the code, in regard to actions at law, still prevail, and apply to actions under the code which are based upon legal, as contradistinguished from equitable principles; and, in like manner, that those equitable principles, which were in force under the old *regime*, are still applicable to actions founded upon those principles, except when the code in express terms provides otherwise. He holds, in other words, that the old distinction between the rules applicable to actions at law, and to equitable actions, so far at least as the former are con-

cerned, still continues, notwithstanding it was declared by the new system that such distinction was abolished. We think it would be giving a more proper construction to the code to say, that the rules, recognized under the old system, whether legal or equitable, should be applied, irrespective of former distinctions, to *all* actions under the new system, when they can be applied, and are not inconsistent with the provisions of the code.

So far as the pleadings are concerned, it is manifest that the spirit of the new system is to require the plaintiff to state in his complaint the facts constituting his cause of action, whether legal or equitable, (*sub.* 2, *of sec.* 38 *of Pr. Act*,) and the defendant to set forth in his answer his true ground of defense, to whichsoever of the former classes of legal or equitable defenses it may belong. Every action is to be prosecuted in the name of the real party in interest, (*sec.* 6,) any person may be made defendant who claims an interest in the controversy adverse to the plaintiff, (*sec.* 13,) and all those united in interest must be joined as plaintiffs or defendants. (*sec.* 14.) The plaintiff may unite several causes of action in the same complaint, but the causes of action so united must belong to one only of the classes specified in SECTION 61, and must affect all the parties to that action and be separately stated. (*sec.* 61.) The defendant may demur to the complaint, when it shall appear upon its face, among other causes of demurrer, that there is a defect of parties, plaintiff or defendant; or that several causes of action have been improperly united; or that the complaint does not state facts sufficient to constitute a cause of action; (*sec.* 40;) and when any of the matters, which are cause of demurrer, do not appear upon the face of the complaint, the objection may be taken by answer. (*sec.* 43.)

According to these provisions, if it appear upon the face of the complaint that there is a non-joinder of plaintiffs or of defendants, the latter may demur; and the same rule must apply, if there be a mis-joinder, for we construe the word *defect* in the act, to mean a defect in the complaint by reason of having either too many or too few parties. In case of a demurrer being interposed the complaint may be amended, (*sec.* 42,) and thus the

suit put in a proper condition for a trial on the merits. In case the defect does not appear on the face of the complaint, the defendant may bring it forward by his answer, and then, in certain cases, as a matter of course, and, in others, on application to the court and on such terms as may be proper, the plaintiff may amend by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, &c., (*sec.* 67, 68,) and upon the amended complaint and the answer to that, the parties are ready to proceed to trial upon the substantial merits.

It is then provided by SECTION 44, that, *if no objection be taken to the complaint by demurrer or answer, the defendant shall be deemed to have waived the same*, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

Let us now apply these provisions of the statute to the case in hand. There was a mis-joinder of defendants in the complaint. This defect not appearing on the face of the complaint, the objection might have been taken in the answer; the plaintiff could then have amended by striking out the name of the defendant improperly united in the suit; the other defendant could then have filed a new answer, and introduced his separate claim of set-off, if he had any, or any other separate defense. We have above seen that there is nothing more incompatible with principle in requiring a mis-joinder to be pleaded in abatement, than in requiring a non-joinder to be thus objected to; and we think that the former objection, equally with the latter, ought to be taken in the answer. By section 44, above cited, the defect is waived, unless the objection be to the jurisdiction of the court, or that the complaint does not state facts sufficient to constitute a cause of action. There is no ground for the former objection. Is there for the latter? We have above noticed in cases of bankruptcy, infancy, &c., that, although one party were discharged, judgment might be rendered against the other, which could not be done, if it were considered that the declaration did not state sufficient facts to constitute a cause of

action against him. We think that the complaint stated facts sufficient to constitute a cause of action against the defendant Dennison alone, and that he cannot object on this ground.

An objection is raised to this construction of the statute under the third subdivision of section 31. This declares that when the action is against two or more defendants, and the summons has been served on all, "judgment may be taken against any or "either of them severally, when the plaintiff would be entitled "to judgment against such defendant or defendants, if the "action had been against them or any of them alone."

In the case before us the summons was served on both the defendants, and the verdict shows that if the suit had been commenced against Dennison alone, the plaintiff would have been entitled to judgment against him. So far as the literal construction of this subdivision is concerned, there is no validity in the objection of the appellant, and it receives plausibility only by reference to distinctions under the old system, which it was the object of the new to abolish.

The provision of the act in relation to suits on promissory notes and bills of exchange is referred to in support of the appellant's position. Section 15 says: "Persons severally liable "upon the same obligation or instrument, including parties to "bills of exchange and promissory notes, may all or any of "them be included in the same action, at the option of the "plaintiff." Full effect may be given to all parts of this section without resorting to the construction given by the appellant. Thus, a suit is brought on a promissory note against A. as maker and C. as indorser. Now, if A. claims that B. is a joint maker with him, he must plead that fact in abatement, or judgment may go against him, even though it should be proved at the trial that B. was a joint maker. So, according to the interpretation which we give to the statute, if a suit be brought against A. and B. as joint makers, and C. as indorser, and either A. or B. claims that there is a mis-joinder of the other, he may insist upon that fact in his answer and set up any several defense, by way of set-off or otherwise, which he might have relied upon if he were charged as sole maker. If he neglects to do this, he

must be deemed to have waived the objection, and if, at the trial, he appears to have been the sole maker, there is no injustice done in giving judgment against him.

There are several other sections of the statute in addition to those already cited, which clearly indicate the intention of the legislature to have been, that all technical and formal defects should be disregarded, and that the rights of all the parties to a suit should be determined in that suit, without turning the parties round to a new action for the purpose of obviating some technical difficulty. Thus it is declared in section 17, that "the "court may determine any controversy between the parties "before it, when it can be done without prejudice to the rights "of others, or by saving their rights; but when a complete de-"termination of the controversy cannot be had without the pre-"sence of other parties, the court shall order them to be brought "in." Section 61 declares that "the court shall, in every stage "of the action, disregard any error or defect in the pleadings or "proceedings which shall not affect the substantial rights of the "adverse party, and no judgment shall be reversed or affected "by reason of such error or defect." Section 279 authorizes this court, on appeal, "to render such judgment as substantial "justice shall require, without regard to formal or technical "defects, errors or imperfections, not affecting the very right "and justice of the case." It was not pretended on the argument, that the defendant Dennison had any set-off or other matter, which he could have urged as a defense in case the suit had been brought against him alone, or that the verdict or judgment was for a greater amount than his individual indebtedness to the plaintiff, and it does not appear how substantial justice would be secured by a judgment in any respect different from that which has been already rendered.

By section 167, "judgment may be given for or against one "or more of several plaintiffs, and for or against one or more of "several defendants, and it may determine the ultimate rights "of the parties on each side as between themselves. In an ac-"tion against several defendants, the court may, in its discre-"tion, render judgment against one or more of them, leaving

"the action to proceed against the others whenever a several "judgment may be proper." The appellant urges, and the same view was taken by the court in *Merrifield* v. *Cooley*, above cited, that the words, *whenever a several judgment may be proper*, imply that there may be cases in which such a judgment would be *improper*. Undoubtedly they do; and we can conceive of cases in which, under our interpretation of the statute, such a judgment would be improper. For instance, in the illustration above given of an action on a promissory note against A. as maker, and C. as indorser, A. may plead the non-joinder of B. in abatement; judgment may then be taken against C. leaving the action to proceed against A. on the issues made by his pleadings. So also in an action against A. and B. as joint makers, and C. as indorser, either A. or B. may plead the mis-joinder in abatement, judgment may be taken against the indorser, leaving the action to proceed against the persons charged as makers, to be determined according to the issues made; or in the case last supposed, if neither of the makers should see fit to plead the mis-joinder, then judgment may be rendered *against* the one proved to be liable, and *for* the one not proved to be liable, leaving the action to proceed against the indorser. The same practice, *mutatis mutandis*, would apply in case of several persons sought to be charged as joint indorsers, when sued in the same action with the maker. We think, therefore, that full effect may be given to this section of the statute, without resorting to the construction which was given in *Merrifield* v. *Cooley*.

We have, in the outset, noticed that the provisions of our Practice Act are, for the most part, taken from the Code of Procedure of New York; and the first clause of section 167 above quoted is a copy *verbatim* of section 230 of that code. The commissioners of the code, in reporting the result of their labors to the legislature, say in reference to that section: "The object of this sec-"tion is to prevent a failure of justice when there happen to be "too many or too few parties brought into court. The ques-"tions arising on the non-joinder or mis-joinder of parties, "are the cause of much delay, vexation and disappointment,

"resulting, not unfrequently in an entire failure of justice. "This section will prevent them hereafter." This shows the object in view in submitting this section to the legislature, and we think the section may, although, perhaps, with occasional clashings with some other sections, be fairly interpreted so as to realize the intentions of the commissioners.

We do not see that this construction can work prejudice to any defendant, for, should it appear for the first time at the trial, that there is either a non-joinder or a mis-joinder, by reason whereof any party has been prevented from urging any defense, which, without such defect, he would be entitled to insist upon, it would not, we apprehend, be too late for him to apply to the court to be permitted to amend on such terms as would be proper.

On the whole we think that the practice should be established as adopted in the court below. But as the question is now in this state, and the defendants have been guided by an adjudicated case upon the same statutory provisions, it is no more than just that the defendant Dennison should have an opportunity of setting up any defense, by way of set-off or otherwise, which he may have separately against the plaintiff. The cause must be remanded to the court below, with leave to the defendant Dennison to apply within ten days after the filing of the *remittitur* for permission to amend his answer by setting up any set-off or other matter, which would be a defense to the action in whole or in part, if the suit had been brought against him alone. If such application be made and granted, the cause will be brought to trial and disposed of in the ordinary way; if such application shall not be made, or if made, it be denied, then the judgment appealed from will become final.

Ordered accordingly.

PERRY vs. COCHRAN.

On a motion for a new trial on the ground of newly discovered evidence, the newly discovered evidence should be fully set forth, or the motion must be overruled.
The finding of a jury, or of the court below, acting as a jury, upon a question of fact, is final and conclusive.

APPEAL from the superior court of the city of San Francisco. Conflicting evidence was adduced by the different parties upon the points in controversy in the superior court, and the court, before whom the cause was tried without a jury, found in favor of the plaintiff, and gave judgment accordingly. A motion was then made by the defendant for a new trial on the ground of newly discovered evidence, but it was not set forth in the papers on which the motion was founded, what the newly discovered evidence was, which the defendant expected to be able to produce in case a new trial should be granted. The court below denied the motion, and the defendant appealed from the judgment thereupon rendered.

———, for plaintiff.

———, for defendant.

By the Court, BENNETT, J. The motion for a new trial on the ground of newly discovered evidence was properly overruled by the superior court.

There is no other question in the case. The other grounds upon which the appellant asks to have the judgment reversed, are all matters of fact, involving no principle of law, and in regard to which we have often decided that the finding of a jury, or of the court below sitting as a jury, must be final and conclusive.

Judgment affirmed.

BUNTING *vs.* BEIDEMAN *et al.*

A contract for the sale of goods, for the price of two hundred dollars or over is void; unless a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged therewith; or, unless the buyer shall accept or receive part of such goods; or, unless the buyer shall at the time pay some part of the purchase money; but *Held*, where the evidence given at the trial did not appear to be fully returned, and there appeared to have been no objection raised or exception taken to the insufficiency of the evidence, that this court would presume that sufficient evidence of a proper character was given to warrant the finding of the jury.

In such case, had a contract in writing been proved, it would not have been necessary to file it with the clerk; and his certificate that he has returned a true and complete transcript of all the papers, &c., in the cause, *on file and of record in his office*, does not show that no contract in writing was proved.

On appeal this court will not consider the testimony as returned, unless it appears in the way of a "statement of facts" settled by the parties, or unless it appears from the return of the clerk that he took down the testimony in writing, at the trial, and at the request of one of the parties.

APPEAL from the superior court of the city of San Francisco. The action was brought to recover the price of thirty-five cases of boots and shoes alleged in the complaint to have been bargained and sold by the plaintiff to the defendants. No objection was made, and no exception taken, by the defendants at the trial, on the ground that a legal contract of sale was not established, and the evidence appeared from the record to have been but partially returned. Judgment was rendered in favor of the plaintiff in the superior court, from which the defendants appeal.

Allen T. Wilson, for plaintiff.

Gregory Yale, for defendants. It does not appear from the record that the contract sought to be enforced was a valid contract within the Statute of Frauds. Section 13 of the Act concerning Fraudulent Conveyances and Contracts, passed April

19, 1850, is as follows:—"Every contract for the sale of any "goods, chattels, or things in action, for the price of two hundred dollars or over, shall be void, unless, 1st, a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged therewith; or, 2d, unless "the buyer shall accept or receive part of such goods, or the "evidences, or some of them, of such things in action; or, 3d, "unless the buyer shall at the time pay some part of the purchase money." It does not appear that either of these requirements of the statute was complied with; the price of the goods was more than $200; and the clerk certifies that he has returned a true and complete transcript of the papers and proceedings, &c., on file and of record in his office.

By the Court, BENNETT, J. The action is brought to recover damages for breach of a special contract for the sale of goods. An answer was put in, and the cause tried before a jury. A verdict was taken for the plaintiffs, in accordance with which judgment was rendered.

It is now claimed that it does not appear that the contract upon which the suit is founded, was in writing, and that it was, therefore, void within the Statute of Frauds. The conclusion follows, if the premises be correct; and the sole question for our determination is whether the record shows that the contract set up was merely a verbal contract.

There are two ways prescribed by our Practice Act for bringing under review, on appeal, the proceedings at the trial. One is by preparing and settling a statement of facts by the parties, according to the 272d section; but there is nothing of that kind in the record. The other mode is pointed out by section 271, which says: "On the trial in the court below, any party may "require the clerk to take down the testimony in writing; "when so taken down, it shall serve as a statement of facts, unless the parties shall afterwards agree to one." But the clerk was not, in pursuance of this section, requested to take down the testimony, nor did he take it down. On the contrary, the papers show with sufficient certainty, that no effort was made to

preserve any evidence, for the purpose of bringing the case under review in this court. The testimony of two witnesses, taken *de bene esse*, is returned by the clerk, for no other reason, that we can perceive, than because it was on file in his office; but he does not undertake to give a transcript of the other evidence, either oral or documentary, which was offered to the jury. We think, in such case, there not appearing to have been any exception taken or objection raised, that we ought to presume that sufficient evidence of a proper character was given to warrant the finding of the jury.

But the counsel for the appellants contends that the certificate of the clerk shows that no written contract was proved. The clerk certifies that he has returned "a true and complete "transcript of all the papers, entries, depositions, written testi- "mony, proceedings and judgment, had in said court, in said "cause, as appears on file and of record in this office." He does not certify that no contract in writing was proved at the trial. Had such a contract been introduced and proved to the jury, it was not necessary to file it with the clerk, and his certificate, consequently, amounts to nothing for the purpose of showing that no such contract was proved. The judgment should be affirmed.

Ordered accordingly.

Walker *vs.* Hauss-Hijo *et al.*

A material man, who has furnished lumber for the erection of a building, has no lien thereon for the price of the materials furnished, unless he files in the recorder's office of the county in which the building is situated, within sixty days after the completion of the building, notice of his intention to hold a lien for the amount due to him, &c.; upon his failure to do so, the lien is lost.

Where a material man institutes proceedings to enforce a lien, a prior mortgagee of the premises on which the building has been erected, will, on his application, be admitted as defendant to contest the plaintiff's claim.

It seems that the lien of a material man cannot take preference over the lien of a prior mortgage.

Appeal from the district court of the county of San Joaquin. The plaintiff, Walker, filed his complaint in the district court for the county of San Joaquin, for the purpose of enforcing a lien which he claimed to have upon a building which he had erected for one Hauss-Hijo. The latter disputed the lien. The defendant Dickenson was not originally made a party to the suit, but was, on his own application, admitted to defend for the purpose of protecting a prior lien which he claimed as mortgagee of the premises on which the building was erected. It appeared, at the trial, that more than sixty days had elapsed after the completion of the building before the plaintiff filed any notice of his lien, and the court was asked to charge the jury that the lien, if any ever existed, was for this reason lost. The court refused so to charge and the defendants excepted. The jury found a verdict in favor of the plaintiff against Hauss-Hijo for the amount of his claim, but did not find that he was entitled to a lien, or that he had filed the requisite notice. The court, however, not only gave judgment personally against Hauss-Hijo for the amount found due by the jury, but also rendered a further judgment declaring the plaintiff's claim to be a lien on the land, and ordering the same to be sold for the satisfaction of the lien. From this judgment the appeal was brought.

Mr. Irving, for the plaintiff.

R. A. Hopkins, for the defendants. The court erred in refusing to charge the jury as requested. (*Sec.* 7 *and* 9, *of act to provide for Mechanics' Liens; Smith* v. *Drew*, 5 *Mass. Rep.* 515; *Lyle* v. *Ducomb*, 5 *Binney*, 585; 14 *Pick.* 49.)

The mortgagee cannot control the mortgagor: a sale of the land under the judgment would convey a perfect title to the purchaser, and thereby defeat the security of the mortgagee. (9 *Watts*, 54; 5 *id.* 487.) The judgment should have been for

a sale of the equity of redemption only. (9 *Serg. & Rawle*, 315.) The judgment was not in accordance with the verdict.

As to Dickenson's right to interplead, *see* 14 *Pick.* 49.

By the Court, Lyons, J. This is an action to recover a debt alleged to be due for lumber furnished, which lumber, it is averred, was used in the construction of a certain building particularly described in plaintiff's petition. Petitioner prays that his claim be considered as a lien, and he seeks to enforce it as such. Pending the suit an interplea is filed by a mortgagee, who sets up, in virtue of his mortgage, a prior lien on the land occupied by the building referred to, and prays for a sale of the whole in satisfaction thereof. The amount claimed by plaintiff is admitted to be due and unpaid, but it is urged that having failed to record his lien as a lumber merchant, in accordance with the requirements of the statute, he is not entitled to the benefit of its provisions. In the court below judgment was rendered in favor of plaintiff, and "a lien on the house described "in complaint decreed." From this judgment interpleader appeals.

The statute "to provide for the lien of mechanics and others" gives ample security to the mechanic and furnisher of materials used in the construction of buildings, &c., but to enable such persons to avail themselves of the extraordinary remedy thus placed within their reach, all the provisions of the law must be strictly complied with. (5 *Mass.* 515.) Sec. 1 of the act before cited, creates a lien in favor (amongst others) of lumber merchants on the buildings in the construction of which the materials furnished have been used. Sec. 7 provides that "any "person wishing to avail himself of the provisions of the first "section, whether his claim be due or not, shall file in the re-"corder's office of the county in which the building is situated, "at any time within sixty days after the completion of the build-"ing, notice of his intention to hold a lien for the amount due, "or to become due to him, specifically setting forth the amount "claimed. Upon his failure to do so the lien shall be lost."

It does not appear from the record that any of the require-

ments of the law have been complied with, and we do not see how the penalty of their non-observance, pointed out in the latter clause of the section quoted, can fail to attach.

The jury before which this cause was tried rendered a verdict in the following words: "We, the jury, find for the plaintiff "the sum of the account, eleven hundred and forty-seven dol- "lars and ninety-three cents." Upon this verdict judgment was entered by order of the court, reciting the verdict of jury, and adding "and that he (plaintiff) is entitled to a lien on the "house described in his complaint, for said amount."

The court erred in rendering judgment essentially different from the verdict of the jury; the latter accords no lien to plaintiff, and although the only question so far as the interpleader was concerned seems to have been entirely overlooked, we think it was not within the discretion of the court to determine it.

Judgment so far as to decree a lien, reversed—the remainder being in conformity with verdict of jury, affirmed.

VOGAN *vs.* BARRIER *et al.*

This court will not disturb the verdict of a jury where nothing appears upon the record of the proceedings at the trial, except conflicting evidence upon a question of fact submitted to, and passed upon, by the jury; and the finding of the court below upon a question of fact will be regarded in the same light as the verdict of a jury.

APPEAL from the superior court of the city of San Francisco. The facts are stated in the opinion of the court.

Wilson Shannon, for the plaintiff.

N. Hubert, for the defendants.

By the Court, LYONS, J. This suit was instituted for the recovery of the price of certain lumber which plaintiff alleges,

defendants, without his knowledge or authority, took and carried away, and converted to their own use. Defendants, denying these allegations, aver that they purchased of plaintiff the lumber at a stipulated price, and the questions presented by the pleadings are solely as to the price of the lumber per thousand feet, and the manner in which the same should be computed, whether by superficial or running measurement.

Testimony is introduced to prove the contract between the parties,—to prove the value of lumber at the time of the transaction, and also to show what is the custom of measurement with lumber dealers. The case throughout presents nothing but questions of fact, which it is the peculiar province of juries to pronounce upon. The court below sitting as a jury has so pronounced, and we see no sufficient reason to disturb its judgment.

Judgment affirmed.

Ex parte, STEPHEN J. FIELD.

Where an order of the district court, fining and imprisoning for contempt, does not specify on its face wherein the contempt consisted, it will be reversed on *certiorari.*

CERTIORARI to the district court of the eighth judicial district. This matter came up on return to the *certiorari* heretofore issued. (*See The People, ex rel. Stephen J. Field* v. *Turner, ante, p.* 152.) The facts will be found stated in the case referred to.

Stephen J. Field, in *pro. per.*

By the Court, LYONS, J. On the return to the writ of *certiorari* heretofore issued, it appears that the order made by the court of the eighth judicial district is the same as that which was before us on the application for the writ. The impressions expressed in the opinion then delivered, have been confirmed by subsequent investigation and reflection. The

order returned by the writ of *certiorari* is therefore reversed and vacated.

Ordered accordingly.

THE PEOPLE, *ex rel.* FIELD *vs.* TURNER, Judge of the Eighth Judicial District.

An attachment will not be issued against a district judge for non-compliance with a writ of *mandamus*, by which he was directed to vacate an order expelling the relator from the bar, and reinstate him in his office of attorney, where it does not appear from the papers on which the motion for the attachment is founded, that any application has been made to the *court* to vacate the order as commanded by the writ of *mandamus*, and where it appears that, so far as the action of the judge in *vacation* is concerned, he has in substance complied with the command of the writ of *mandamus*: and in such case, it will not be deemed a disobedience of the writ, that the court has again expelled the relator for reasons alleged to have arisen *after* the issuing of the writ.

APPLICATION for an attachment against the Judge of the Eighth Judicial District. The facts on which the motion was based will be found in the opinion of the court, and in *The People, ex rel. Mulford* v. *The Judge of the Eighth Judicial District*, (*ante*, *p.* 143,) and in *The People, ex rel. Field* v. *The same*, (*ante*, *p.* 152.)

Stephen J. Field, in *pro. per.*

By the Court, HASTINGS, Ch. J. At the last term of this court, Stephen J. Field and others, practising as attorneys and residing in the town of Marysville of this state, appeared before the supreme court and were admitted attorneys thereof. After being so admitted they presented to the court a petition representing that, without *notice*, the judge of the eighth judicial district, at the preceding term of the Yuba district court, ordered the said Field and others to be expelled from the bar. This order, it appeared, was based upon an alleged contempt of the district court. We then decided, and see no reason now to

change our views, that an order of expulsion of a member of the bar, without notice to appear and answer, having no opportunity of being heard and making his defence, was irregular and void, and issued a writ of *mandamus*, commanding the judge to cause to be vacated the order specified. A motion is now made in this court by Mr. Field for an attachment against the judge for contempt, in not obeying the process of *mandamus*. The affidavit of Field represents that said order has not been vacated, and a certificate of the clerk is appended, by which it appears that the order, as entered upon the docket, remains as yet uncancelled, and that Field and others have again been expelled by the judge since the service of the *mandamus*. No motion was made by either of the attorneys expelled or by any person in their behalf, in the district court, to cause the order to be vacated, nor docs it appear from any of the papers presented that the judge has refused to obey the mandate of this court. It appears that after service of the *mandamus*, Field and others were summoned to appear before the district court of Sutter county to show cause why they should not be expelled from the bar, for an alleged contempt, committed since the proceedings in the supreme court, in relation to the first expulsion. An inference may be fairly drawn from these last proceedings that the judge had in substance obeyed the mandate of this court.

The attorneys had been expelled, and unless the power of this court to restore was fully recognized, it would appear unnecessary to re-expel them.

At the October term of the Sutter district court, 1850, an order was entered by direction of the judge on the records of the court, the preamble of which is as follows: "Whereas the "supreme court having reinstated Stephen J. Field, F. O. Good-"win, and S. B. Mulford, as members of the bar of the district "court of the eighth judicial district, after having been expell-"ed from the same by an order of said court," &c.

The power of this court to restore was thus recognized, and the mandate of the court substantially complied with.

Motion refused.

THE PEOPLE *ex rel.* STEPHEN J. FIELD *et al. vs.* WILLIAM R. TURNER, Judge of the Eighth Judicial District.

Where a person has been admitted as an attorney and counsellor of this court, the district court has no authority to remove him from office; and if it does, a *mandamus* may issue to restore him, although the party might have a remedy by action, it appearing that such remedy would be inadequate and would subject the party to great delay.

APPLICATION for a *mandamus* to the judge of the eighth judicial district. The facts are stated in the opinion of the court, and in the preceding case, and the cases there referred to.

Stephen J. Field, in *pro. per.* for relators.

By the Court, HASTINGS, Ch. J. The relator represents that he, Mulford and Goodwin, have again been expelled from the bar as attorneys of the eighth judicial district by the respondent while holding the October term of the district court for Sutter county of said district. The proceedings of the court are irregular; and, inasmuch as the relators have received from this court a license to practise as attorneys-at-law in the supreme court, and by the rules of court are authorized by virtue thereof, *to practice* in all the courts of this state, we are called upon to afford relief.

If the proceedings are void the relators would have their action for damages if interrupted or deprived of the privileges and emoluments conferred by the license; but this, if a remedy at all, would be too uncertain, and subject the party to great delay. We see no other remedy in such cases than that which is afforded by the writ of *mandamus*. Blackstone, in his Commentaries, says that this writ "may be issued in some cases "where the injured party has also another more tedious method "of redress, as in the case of admission or restitution to an "office." The courts of the several states make frequent use of this writ in restoring to office incumbents who have been

illegally ousted. See *People* v. *Fletcher and others*, 2 *Scam.* 486; *Breese's Rep.* 25; 6 *Mass.* 462; 20 *Pick.* 484, 495.

It lies to the common pleas to restore an attorney removed by them. (1 *John. Cases*, 181.)

An alternative writ of *mandamus* is ordered, commanding the said judge of said district to cause to be vacated the order of expulsion entered on the records of the district court of Sutter county as to the relators, and to permit them to practice as attorneys-at-law in all the courts of the eighth judicial district, or show cause why the same shall not be done, at the next term of this court.

Ordered accordingly.

ACQUITAL *et al.* *vs.* CROWELL *et al.*

Where it appears by the plaintiff's testimony at the trial that there is a non-joinder of persons who should have been made plaintiffs, and a motion for a nonsuit is made on this ground, the court may permit an amendment by adding the name of a co-plaintiff on such terms as may be just.

Where four persons were sued as co-defendants on a joint contract, and the plaintiffs adduced no evidence to establish the joint liability of all, and a motion for a nonsuit was made on this ground, but refused by the court, and judgment was rendered against all the defendants jointly; *Held*, that the judgment was erroneous; but *held* further, that the plaintiffs might have discontinued the suit as against those not shown to be liable, and have proceeded to judgment against those whose liability was established, upon such terms and conditions as should appear to be just.

It seems, that where the verdict is clearly contrary to evidence, this court may reverse the judgment on that account.

APPEAL from the superior court of the city of San Francisco. The facts are related in the opinion of the court.

Gregory Yale, for plaintiffs.

———, for defendants.

By the Court, HASTINGS, Ch. J. This action was instituted in the name of Acquital, complainant, against the defendants, for the recovery of $6709,50 for Sandwich Island potatoes sold to one of the defendants on board of the schooner *Elizabeth*, by sample.

The plaintiffs on the trial having examined several witnesses, closed, and the defendants moved for a nonsuit, on the ground that no evidence had been introduced as to the quantity and value of the potatoes. Whereupon, the plaintiff, Acquital, introduced the following paper in evidence:

"Sold for account of Captain Acquital to Mr. —— McDowell, "two hundred barrels Sandwich Island potatoes, as per sample, "at the rate of eighteen cents per pound, to be taken from the "ship's tackles. The potatoes to be in sound and merchantable "condition. Payment by cash on delivery of potatoes.

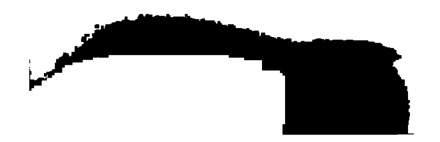
(Signed) "ACQUITAL.
"THOMAS MCDOWELL.
"E. BOURGEOISE."

The defendants again insisting upon a nonsuit for the reason that the contract was in writing, and there being a non-joinder of parties plaintiffs, and a misjoinder of parties defendants, the plaintiffs were permitted to amend, by adding the name of Bourgeoise as co-plaintiff.

Could the plaintiffs thus amend, and was the variance between the complaint and proof fatal? The 64th sec. of the Practice Act provides that no variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his defense on the merits, and if so proved, the pleadings may be amended on such terms as shall be just.

By the 68th sec., the court may at any time, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceeding by *adding* or *striking out* the name of any party.

It will be perceived by an examination of the sections of the statute referred to, and other sections of the same statute in relation to amendments, that the plaintiff has the right to amend



so long as he has a substantial cause of action against *one* or several defendants, and is authorized to conform the pleadings to the facts, by order of the court, upon such terms as will not work injustice to the defendant. In this case we think the court did not err in permitting plaintiff to add a co-plaintiff, but the contract seems to have been in writing, and signed by McDowell alone. And there being testimony of several witnesses tending to show that this was an individual transaction, and that McDowell was accustomed to purchase as well on his own account as on account of the firm of "Crowell, McDowell & "Co.," and there being no proof of liability on the part of the other defendants by any act of theirs, or admission, we think a nonsuit should have been ordered as to them, and the jury permitted to pass upon the liability of McDowell alone. The judgment now stands against parties who do not appear to have been connected with the transaction, which is clearly erroneous, and the judgment should be reversed. Besides, it appears that the jury returned a verdict for the full amount claimed, while there was evidence that the potatoes were greatly damaged when delivered. We think the verdict also clearly contrary to the evidence in this respect.

Judgment reversed, and cause remanded.

GROGAN & LENT *vs.* RUCKLE.

This court may, after its judgment has been pronounced, direct a re-hearing at any time before the *remittitur* has been sent to, and filed in, the clerk's office of the court below; after that has been done, the jurisdiction of this court to order a re-hearing, ceases; but *held*, that, after an order had been made granting a re-hearing, the *remittitur* was filed with the court below, the jurisdiction to reconsider the cause was not taken away. 1 Seld. R. 455 7 Whea. 58

The doctrine of *Grogan & Lent* v. *Ruckle*, (*ante*, *p.* 158,) that where an action is brought by an indorsee against the maker of a promissory note, it is not necessary that the latter should deny the indorsement under oath, reconsidered and affirmed.

The complaint alleged the making of a note and the indorsement thereof, and the answer was a general denial in the terms of the old general issue in *assumpsit*, that the defendant undertook and promised, in manner and form, &c.; *Held*, that the plaintiff would have been entitled to judgment, on a motion in the court below to strike out the answer as a nullity; but *held* further, that he should have raised his objection to the answer in the court below and had it passed upon, and that having rested his cause at the trial on the ground of want of an affidavit, he will not be permitted to say here, for the first time, that the answer does not, in a proper form, controvert the allegations of the complaint.

On a re-hearing, a party will not be permitted to raise any point which was not urged on the first argument.

THE points in this case, which are given in the opinion of the court, came up on a re-argument of the case of *Ruckle* v. *Grogan & Lent*, (*ante*, *p.* 158.)

R. A. Lockwood, for plaintiff.

John Currey, for defendants.

By the Court, BENNETT, J. On the re-argument of this cause the objection was taken by the appellant, that this court cannot, after its judgment has been pronounced, direct a re-hearing.

Section 280 of the Practice Act provides that, "after an ap- "peal shall have been heard and determined, the judgment or "order of the supreme court therein, and all things concerning "the same, shall be remitted to the district court of the proper "county, and thereupon such further proceedings shall be had "in that court as may be necessary to carry such judgment or "order into effect."

Section 18 of the act organizing this court is to the same effect. It declares that, "the supreme court may reverse, "affirm, or modify the judgment or order appealed from, and "its judgment shall be remitted as soon as practicable, after "judgment pronounced, to the court below, to be enforced ac- "cording to law."

We are of opinion that this court loses jurisdiction of the cause, when the *remittitur* has been sent to, and filed in, the court below; but that our control over the cause does not cease

until that has been done; and so are the decisions of courts, the jurisdiction and powers of which are analogous to those of this court. (*Burkle* v. *Luce*, 1 *Comstock*, 240; *Martin* v. *Nelson*, *id.* 241; *Delaplaine and others* v. *Bergen*, 7 *Hill*, 591.)

In this cause the *remittitur*, it appears, was filed with the clerk of the district court "on or before" the 25th day of December last; but the order for a re-hearing was made and entered on the 18th day of the same month, when the court had jurisdiction of the cause and the power to make the order. The *remittitur* was improperly sent to the district court after the entry of the order granting a re-hearing, and such act ought not to be permitted to supersede the order.

We have reconsidered our decision made on the point submitted on the first argument, and think it correct.

On the re-hearing a new point has been made by the respondent, to understand which, it is necessary to advert to the facts presented by the record.

The action is brought by the indorsee of a promissory note payable to order against the maker. The declaration alleges the making of the note and the indorsement, and the answer denies generally in the terms of the old general issue in *assumpsit*, that the defendant undertook and promised in manner and form, &c. The point now made is, that the answer does not deny the indorsement of the note, and that, consequently, such indorsement was admitted of record.

The first subdivision of the 45th section of the Practice Act provides, that in respect to each allegation of the complaint controverted by the defendant, the answer shall contain a general or specific denial thereof, or a denial thereof according to the information and belief of the defendant, or of any knowledge thereof sufficient to form a belief; and section 63 declares that every material allegation of the complaint not controverted by the answer, shall, for the purposes of the action, be taken as true.

It has been held under the new code of procedure in New York, which, upon the question now under consideration, is the same as our practice act, that the plea of the general issue would

be stricken out, and the plaintiff be entitled to judgment. (*Pierson* v. *Cooley*, 1 *Code Reporter*, 91; *Stoker* v. *Hagar*, *id.* 84; *Beers* v. *Squire*, *id.* 84; *Mier* v. *Cartledge*, 2 *id.* 125.) In the answer before us there is no general or specific denial of the allegation in the complaint as to the indorsement of the note, and if the cause had been put upon this ground in the court below, we should think that the judgment ought to be affirmed. But we understand the position of the plaintiff in the district court to have been, that the indorsement was admitted because there was no affidavit annexed to the answer denying such indorsement. We held in the former decision of this cause, and we think correctly, that where an action is brought by an indorsee against the maker of a note, it is not necessary that the latter should deny the indorsement *on oath*—that the case did not come within the 62d section of the Practice Act, which prescribes that "when any complaint or answer is founded on any "instrument of writing which is alleged to have been signed "by the party, the signature shall be considered as admitted, "unless denied by such party on oath."

If the plaintiff deemed the answer insufficient to controvert the allegation of indorsement, he should have put his case in the district court upon that ground, and thus the defendant would have known the real objection to his answer, and might have made an application to the court for permission to amend, or to withdraw his answer and substitute another in its place. But the plaintiff tried the cause in the same manner as if the averments in the complaint had been properly controverted by the answer, and then, when the cause comes into this court, the objection to the insufficiency of the answer is raised for the first time on the second argument of the cause.

We think the proper practice to be established is, that if the plaintiff considers the answer a nullity, he should raise the point in the court below and have it passed upon; and that if he there rests his cause on the ground of the want of an affidavit, he ought not to be permitted to say here, for the first time, that the answer does not, in a proper form, controvert the allegations of the complaint.

In determining this case we are also influenced in some degree, by the known fact, that when this answer was put in, it was difficult, owing to the delay in the publication of the laws of the last session of the legislature, to ascertain what provisions had been made as to practice and pleadings.

It was intimated by the court on the argument, that on a rehearing the whole cause was open and either party might raise such objections and make such points, as he could have raised and made on the first argument. On reflection we think otherwise. A party should present his whole case on the first hearing, and ought not to be permitted to argue it by piece-meal. This is the practice in Louisiana, (1 *Robinson's Rep.* 330,) and, as a general rule, we approve of it.

Our former decision granting a new trial must stand. The defendant is to have leave to move the district court to be permitted to amend his answer on such terms as may be deemed just.

Ordered accordingly.

THE BOARD OF HEALTH OF THE MARINE HOSPITAL FOR THE STATE OF CALIFORNIA *vs.* THE PACIFIC MAIL S. S. CO.

An action founded upon a statute to recover a penalty, where no penalty is imposed by the statute, cannot be sustained.

Where a statute required the owners or consignees of every vessel entering the harbor of San Francisco to give a several bond to the state in a penalty of two hundred dollars for every passenger and member of the crew on board of such vessel, but no penalty was given by the statute for the neglect or refusal to give such bond, and an action was brought to recover $200 for each passenger brought on the defendant's steamer into the port of San Francisco, as a *penalty for neglecting to give such bond; Held*, that the action could not be sustained.

If, in such case, any action at all can be brought, it must be to recover such *damages* as the plaintiffs can show they have actually sustained by reason of the refusal to give the bond; but they cannot succeed in an action to recover a *penalty*. *Per* BENNETT, J.

return in the appeal, and bring the cause on for argument on the day to which the court will next stand adjourned.

Ordered accordingly.

MICKLE *et al.* *vs.* SANCHEZ.

The plaintiffs held certain security on real estate for the payment of an indebtedness of M. to them, but gave up and cancelled such security upon B. executing a bond in their favor, the condition of which was that B. should pay to the plaintiffs such amount, not exceeding $4000, as should be found due to them from M. after the sale of certain goods *and the winding up of the accounts of M. with the plaintiffs*, the payment of which bond was guaranteed by the defendant *under the same conditions expressed therein; Held*, in an action on the defendant's guaranty, that the want of an averment in the complaint of the *winding up of the accounts of the plaintiffs with M.*, or any averment equivalent thereto, rendered the complaint substantially defective, and judgment was given for the defendant on demurrer to the complaint.

A written contract must be construed so as to give effect, if possible, to all parts of it. *Per* BENNETT, J.

APPEAL from the superior court of the city of San Francisco. A demurrer was filed to the complaint, and the cause was heard and decided in the superior court upon the demurrer, and judgment rendered thereon in favor of the plaintiffs. The case, without the formality of a regular appeal, was submitted to this court by stipulation of the respective attorneys, under the agreement that the decision of the court upon the question presented by the demurrer should be final.

Alexander Campbell, for plaintiffs.

John Chetwood, for defendant.

By the Court, BENNETT, J. The papers show that one Maiben of Valparaiso was indebted to the plaintiffs, a firm doing business at San Francisco under the name of E. Mickle & Co. in the sum of $3000 for commissions, and to the firm of Mickle &

Co. of Valparaiso, the correspondents of the plaintiffs, in the further sum of $6000. The plaintiffs had, in their hands, goods consigned to them by Maiben of the value of $5514,50, at the market value, over and above all probable charges and commissions thereon. To secure the indebtedness of $6000 to the house of Mickle & Co. of Valparaiso, one Bernardino Sanchez executed a bond to the plaintiffs in the penal sum of $12,000, conditioned, that, if, upon the receipt of a letter from the firm of Mickle & Co. it should appear that Maiben had paid such indebtedness, the bond should be void, otherwise to remain in force.

On the 20th of May 1850, the letter mentioned in the bond was received, wherein it appeared that Maiben was indebted to the firm of Mickle & Co. in the sum of $6514,50. It further appeared from such letter that Maiben had become insolvent and was unable to pay his debts, but there is no averment of his insolvency in the declaration.

After the receipt of this letter and on the 23d day of May 1850, an arrangement was made between the plaintiffs and Bernardino Sanchez in pursuance of which the above mentioned bond was taken up and a new one executed in the penal sum of $4000. The condition of this latter bond was, that if, on the sale of the balance of the goods in the hands of the plaintiffs, and *the subsequent winding up of the accounts of Maiben with them*, the nett proceeds should be sufficient to cancel the indebtedness of Maiben to the plaintiffs, and to the house of Mickle & Co. of Valparaiso, the obligation was to be void.

On the 27th day of June 1850, the defendant guaranteed the payment of the last mentioned bond, *under the same conditions expressed therein.* The goods in the hands of the plaintiffs were destroyed by fire without any fault or negligence on their part; and this we shall consider, for the purpose of deciding upon the demurrer, as equivalent to a sale of them at their estimated value.

It is unnecessary to determine whether the undertaking of the defendant is void under the statute of frauds, as we think the demurrer must be sustained on other grounds. The defend-

ant made himself liable to pay the balance, not exceeding $4000, which should be found due *after the winding up of the accounts of Maiben with the plaintiffs*. The bond containing this condition was executed after it had been ascertained that Maiben was insolvent, and it contemplates some farther statement and settlement of accounts between him and the plaintiffs than had, at that time, taken place. Though Maiben was insolvent, it may well be that his estate would be sufficient to pay a dividend to some extent upon his indebtedness, and that thus a portion of the debt which the defendant assumed to pay, would be cancelled. The most reasonable construction which we can give to this clause is the following. Maiben, a known insolvent, is indebted to the plaintiffs in a certain sum. The defendant assumes that indebtedness to the amount of $4000, provided, on the settlement of the estate of Maiben, and the payment to the plaintiffs of such dividend out of the estate as they shall be found entitled to, there shall still remain that sum due from Maiben. Whether this be the correct construction, or whether it be, that the parties merely contemplated, after the sale of the goods, a statement of accounts between the plaintiffs and Maiben, and ascertaining the balance due, it is manifest that something is required beyond the sale of the goods. Otherwise, the clause is senseless, and the condition would mean the same without it, as it means with it. But we must construe the instrument so as to give effect, if possible, to all parts of it. Whatever may be the true meaning, there is no averment by the plaintiffs of "the subsequent winding up of the accounts of "Maiben with them," nor any thing which can be deemed equivalent to such averment; and without this, we think the complaint substantially defective.

Judgment must be rendered on the demurrer in favor of the defendant.

Ordered accordingly.

WOODWORTH *et al. vs.* GUZMAN *et al.*

A prior unrecorded mortgage has priority of lien over a subsequent recorded mortgage, where the second mortgagee had notice of the existence of the first incumbrance; and this was so, as well before as since the enactment of the statute by which the common law was adopted in California.

Whether there was any officer in San Francisco authorized to record mortgages previous to the passage of the act of the legislature establishing recorders' offices, passed April 4, 1850, with the effect of making them constructive notice to subsequent purchasers or mortgagees; Query?

The object of laws which require deeds and mortgages to be recorded, is to prevent imposition upon subsequent purchasers and mortgagees, in good faith, and without notice of the prior deed or incumbrance, but not to protect them when they have such notice. *Per* BENNETT, J.

No particular form of words is necessary to constitute a mortgage; and where two instruments taken together described the property and the amount of indebtedness, and conveyed the premises as security for the indebtedness; *Held*, to be a sufficient mortgage.

A court of equity will, as against the mortgagor, correct a mistake in the description of the mortgaged premises, as a matter of course; and a person claiming under the mortgagor, and having notice of a prior lien upon the premises, is in no better condition than the mortgagor himself.

APPEAL from the superior court of the city of San Francisco. The complaint was filed for the purpose of foreclosing a mortgage upon certain premises situated in the city of San Francisco, made and executed by the defendant Guzman to the plaintiffs, on the 14th day of August, A.D. 1849. Guzman, at the time of making the mortgage, claimed to own the premises under a deed of conveyance from one Samuel Brannan, executed by said Brannan on the 17th day of June, 1849. The premises described in the deed from Brannan to Guzman are designated therein as situated on *Washington* street, in the city of San Francisco, but Brannan gave a receipt to Guzman for $1000 in part payment of the purchase money, in which receipt the premises are described as lying on *Montgomery* street. This receipt was delivered to Guzman.

The defendant Guzman being desirous of raising $3000, ap-

plied to the plaintiffs, and proposed to give them as security a lien on the premises in suit. They accordingly loaned him that sum; and Guzman delivered to them the receipt given by Brannan as above mentioned, with a transfer thereon written in the words following:—

"I hereby transfer all my right, title, and interest in the "above-named premises to Woodworth & Morris, as security "for the payment of ($3000) three thousand dollars, as per "agreement, which I am bound to them to pay on or before the "fourteenth day of February, 1850."

On the eighth day of November, 1849, Guzman mortgaged the premises in controversy to Rynders to secure the payment of $7000, loaned by Rynders to Guzman.

At the trial of the cause it was proved that Rynders had notice of the mortgage for $3000 to the plaintiffs, and expressed his willingness to advance the amount which Guzman wanted, upon the security of the premises in question, subject to the lien of the plaintiffs for the amount loaned by them.

Brannan also testified that it was by mistake, occasioned by the hurry in which the receipt given by him was drawn up, that the premises were therein described as situated on *Montgomery* street instead of *Washington* street, which latter were intended to be described therein.

A decree of foreclosure was entered in the court below, and the lien of the plaintiffs' mortgage was declared to be prior and superior to that of the defendant Rynders. From the judgment thus rendered by the superior court the defendant Rynders appeals.

Edward Norton, for plaintiffs.

John B. Weller, for defendant Rynders.

By the Court, BENNETT, J. The question in this case is as to priority of lien upon land. The plaintiffs had a mortgage on the premises in question. Guzman desired to borrow $7,000 of Rynders. The latter was informed of the existence of the plain-

tiffs' mortgage, but thought the property sufficient security, and said that he was willing to loan the money, and take a mortgage subject to that of the plaintiffs.

Rynders, having knowledge of the existence of the plaintiffs' mortgage, has no reason to complain that it was not recorded. It is well settled in the states, where statutes requiring mortgages to be recorded are in force, that if a subsequent mortgagee has notice of the existence of a prior unrecorded mortgage, he takes his lien subject to the lien of the first mortgagee. We think the same rule applies under the Mexican system. The object of such laws is to prevent imposition upon subsequent purchasers and mortgagees, in good faith, and without notice of the prior incumbrance; and when they have such notice, to permit their subsequent mortgages to take priority over a previous one, even though unrecorded, would be, not to protect them, but to enable them to impose upon others.

Besides, we are not aware that there was any officer in San Francisco, who, according to Mexican law, was authorized to record mortgages; and unless there was, we see not how the authorities cited by the appellant can apply.

But it is said that the instrument under which the plaintiffs claim, was not a mortgage. No particular form of words is necessary to constitute a mortgage, more than any other contract. The receipt of June 17th, and the transfer by Guzman to the plaintiffs must be construed together. Taken in this way, they describe the property, and the amount of indebtedness, and convey the land as security therefor. We think this sufficient to constitute a mortgage.

It is also said that the plaintiffs' mortgage does not describe the same premises upon which Rynders' mortgage was taken. The premises are misdescribed, it is true; but Brannan testifies that that was a mistake committed in the hurry of drawing up the receipt. This mistake a court of equity would correct, of course, as against the mortgagor, so as to make the mortgage conform to the intention of the parties; and Rynders, having had notice that the lien of the plaintiffs was upon the identical lot on which

he took his mortgage, is in no better condition than Guzman the mortgagor. We think the judgment should be affirmed.

Ordered accordingly.

De Boom *vs.* Priestly *et al.*

Where a demurrer to the complaint is put in, and overruled, and the defendant then answers, the answer is a waiver of the demurrer.

Where a special contract for the performance of work is proved, but it is also shown that the contract has been deviated from, the judgment will not be reversed on the ground that the court below admitted testimony as to the value of the plaintiff's services.

Where there has been a special contract to erect a building at a specified price, and according to an agreed plan, and the contract is afterwards deviated from by consent, the plaintiff cannot recover upon the express contract; for the reason that the work has not been performed according to the terms of the express contract; though, at the trial, the measure of compensation must be graduated by the terms of the contract, so far as the work can be traced under it.

Appeal from the superior court of the city of San Francisco. The points on which the decision is based are stated in the opinion of the court.

Alexander Wells, for plaintiff.

Gregory Yale, for defendants.

By the Court, Bennett, J. There was a special contract between the parties for the erection of a building, which was deviated from in pursuance of instructions from the defendants. The action was brought on a *quantum meruit*. The defendants demurred to the complaint. The demurrer was overruled, and they put in a plea to the merits. The plea was a waiver of the demurrer, and no point can be made upon that now.

At the trial, the court admitted testimony of the value of the plaintiff's services, though there was evidence of a special con-

tract. But the contract had been deviated from, and therefore the evidence was proper.

The only question in the case, which presents any difficulty, arises upon the third instruction asked by the defendants. That was as follows:—"If the jury believe that there was a special "contract between the parties to erect the buildings at a speci-"fied price, and according to an agreed plan, which was after-"wards changed by consent, the plaintiffs are compelled to *sue* "*upon that special contract* so far as it can be traced, and can-"not recover upon an implied contract for work and labor, or "for materials."

This instruction was, however, properly refused. In such a case as this, the plaintiff *can* sue upon an implied contract. Indeed, should he sue upon the express contract, he must necessarily fail; because he cannot prove that the work has been done according to the terms of the contract; and he must recover, if at all, upon an implied contract for work and labor and for materials; though, at the trial, as the measure of compensation, the recovery must be graduated according to the terms of the contract, so far as the work can be traced under the contract. But this was not the instruction asked by the defendants. The judgment should be affirmed.

Ordered accordingly.

TOHLER *vs.* FOLSOM *et al.*

Overruled 4 Ca. R. 90, 93

The case of *Hoen* v. *Simmons et al.*, (*ante*, *p.* 119,) deciding that a verbal contract, of itself alone, was insufficient, under Mexican law, to transfer the title to real estate, affirmed: but where there was a verbal contract of sale *in presenti*, and the title deeds were delivered by the vendor to the vendee, and permission given to the vendee to enter upon and take possession of the land, and the vendee did, accordingly, take possession and make valuable improvements on the premises; *Held*, that a specific performance of the verbal contract should be decreed.

Where there has been such a part performance of a verbal contract of sale by the plaintiff, as to put him into a situation, which would operate as a fraud upon him,

unless the verbal agreement should be enforced, a specific performance of the contract will be decreed.

Under a verbal contract of sale of real estate, the delivery of the title deeds is equivalent to a *symbolical* delivery of, and admission into, possession of the property, as between *vendor and vendee*, whatever might be its effect in conferring *actual possession*, in case the rights of *third persons* were concerned.

Where it is apparent that, in case a new trial should be granted, the verdict of the jury must be in favor of the plaintiff, the judgment of the court below in favor of the plaintiff will not be disturbed.

Appeal from the superior court of the city of San Francisco. The parties agreed to waive a jury trial in the court below, and stipulated that the following facts should be taken as a special verdict, and that the court should render judgment thereon, to be of the same force and effect as if they had been specially found by a jury; viz.:

"That Wm. A. Leidesdorff was in possession of a lot claim-"ing title thereto situate in the city of San Francisco, and "known on the official plat of said town as lot No. 94, which "lot is 50 *varas* square: That about 1st May, 1848, said Leid-"esdorff bargained and sold said lot to the plaintiff at and for "the sum of $500, payable in one and two years without secu-"rity, and that no memorandum or note in writing of said con-"tract was made, nor any conveyance for said lot executed by "said Leidesdorff in his lifetime, who was taken sick a day or "two after said contract was made, and in some seven or eight days "thereafter died: That said Leidesdorff entered with the plain-"tiff into the office of the Alcalde of said town talking about title "papers, and holding in his hands papers having the appear-"ance of title papers, which he handed to the plaintiff, and, in "reply to an inquiry made by him the plaintiff, he the said "Leidesdorff replied he wanted no security, and that he the "plaintiff might make out the papers as he pleased: That "the plaintiff then produced from his possession several origi-"nal deeds; to wit: original grants from Francisco Sanchez, "Juez de Paz in San Francisco, to Manuel Sanchez, dated 3d "December 1843—deed from Manuel Sanchez to A. A. An-"drews dated 8th December 1843—deed from Augustus A. "Andrews to William A. Leidesdorff, dated 20th December

"1847, as the deeds above referred to, and proved their due "execution: That the said Leidesdorff sold said lot to the plain-"tiff, with a knowledge that he the said plaintiff bought to "build thereon: That upon said contract he took possession of "said lot, and proceeded to enclose and improve it, building a "dwelling and several out-houses thereon at very great cost, the "plaintiff being and having been ever since uninterruptedly in "possession: That said Leidesdorff, previously to sale to plain-"tiff, offered said lot to others at same price, but it was declined, "because the price was thought too high: That the plaintiff, "after the death of said Leidesdorff, applied to his administra-"tor for a title to said lot, supposing in the then unsettled con-"dition of the law and the country, that he was the proper per-"son to make a title, more especially as the said Leidesdorff "died without heirs known to the plaintiff, who refused how-"ever to give him a title to said lot, although the plaintiff was "ready and offered to comply with the terms of the contract on "his part: That the plaintiff thereupon instituted a suit against "said administrator for a specific execution of said contract in "the Alcalde's court in and for the city of San Francisco, who "decreed that he should make the plaintiff a title therefor: "That the purchase money was duly tendered to said adminis-"trator, who refused to receive the same, and who continued to "refuse to make title to said lot to the plaintiff notwithstanding "the decrees of the said Alcalde."

On the above special verdict, the cause was argued before the superior court, and judgment was rendered in favor of the plaintiff. No question was made in the court below or in this court, whether the defendants were the proper persons to be made defendants in a suit for specific performance; but it seems to have been conceded on both sides that W. D. M. Howard, one of the defendants, had charge of the estate of Leidesdorff after his decease, by virtue of some appointment as administrator made by the Alcalde of San Francisco; that Anna Maria Sparks, another of the defendants, was the heir at law of Leidesdorff, and that Joseph L. Folsom, another of the defendants, claimed some interest in the lot under Anna Maria

Sparks. No point was made upon any of these questions, and, consequently, neither of them is considered in the opinion of the court. The cause was argued by

Wm. Smith, for the plaintiff, and

A. C. Peachy, for the defendants.

By the Court, BENNETT, J. A verbal contract was entered into between the plaintiff and one Leidesdorff, now deceased, to whose estate the defendants have succeeded, by which Leidesdorff conveyed to the plaintiff a lot of land in the city of San Francisco, and the plaintiff agreed to pay therefor five hundred dollars in equal instalments in one and two years. It was decided in *Hoen* v. *Simmons et al.*, that under Mexican as well as American law, a verbal contract was, of itself alone, insufficient to transfer the title to real estate. That point has again been argued, and we think it entirely clear that the decision in *Hoen* v. *Simmons et al.* was correct. Unless, therefore, there be circumstances in this case which distinguish it from that, the plaintiff cannot recover. There, the defendants, who had filed a cross bill and thereby become actors, claimed that they were entitled to a specific performance of their verbal agreement. It appeared, however, that there was not even a verbal contract of sale *in presenti*, but a contract to convey at a future period, and that that contract was, by the understanding of the parties, to be reduced to writing and signed by them, which was never done. There was no delivery of possession of the land either corporeally or symbolically; the party claiming the specific performance, did not take possession of the land, with the knowledge or consent of the other party, or his agent, or representative, and had entirely neglected to comply, on his part, with the stipulations of the verbal contract so far as the payments were concerned. We thought, he had no right to a specific performance.

In the present case, Leidesdorff, at the time of the verbal contract of sale, delivered to the plaintiff the title deeds of the

lot, and the latter afterwards took actual possession of the land and has made improvements thereon at a cost of several thousand dollars. Before bringing suit, he tendered, and deposited in court, the full amount of the purchase money, and did all that a court of equity would require him to do, in order to enable him to come into court and say, that he had, on his part, done equity; and although the verbal contract, of itself, be not binding, yet, if the circumstances be such, that a court of equity would decree a specific performance, then the judgment appealed from ought to be affirmed.

In *Hoen* v. *Simmons et al.* the court was asked to decree a specific performance on two grounds; 1. That the verbal contract was equally valid, as if it had been in writing; and 2. Admitting the verbal contract to be invalid, that the circumstances were such, that the court ought to decree a specific performance. We decided both points in the negative.

In the present case, the plaintiff prays for a specific performance on the same grounds, upon which it was asked in *Hoen* v. *Simmons et al.;* 1. That his verbal contract was binding; and 2. That the circumstances give him an equitable claim for the relief prayed. The first point was decided against him in *Hoen* v. *Simmons et al.*; and, therefore, upon the decision of the last his case must depend.

The question then is, whether the facts of this case be such as, in a court of equity, will entitle him to a specific performance of the verbal contract.

The ground upon which courts of equity interfere in cases of this sort is, that, without such interference, one party would be enabled to practice a fraud upon the other; and it could never be the intention of the law requiring contracts for the sale of land to be in writing, to enable any party to commit such a fraud with impunity. When one party has executed his part of the agreement in the confidence that the other party would do the same, it is obvious, that if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice. (2 *Story*, *Eq. Juris. sec.* 759.) The counsel for the appellants seemed to argue this branch of the case upon

the assumption that it was necessary for the plaintiff to establish, that his vendor had been guilty of practising some fraud upon him in the making of the verbal contract. This, however, is not so. The question is, not so much in reference to the original transaction, as to subsequent matters—not so much whether a fraud has been perpetrated, as whether, if the vendor were permitted to deny the sale, such denial would operate so as to enable him to effectuate a fraud.

The question, therefore, in this case, is, whether there has been such a part performance by the plaintiff, as to put him into a situation, which would be a fraud upon him, unless the verbal agreement should be enforced. (*Story*, *Eq. Juris. sec.* 761.) One case put by Story, (*id. ibid.*,) in which specific performance ought to be decreed, is, where a vendee, upon a parol agreement for a sale of land, should proceed to build a house on the land, in a confidence of the due completion of the contract. In such a case, he says, there would be a manifest fraud upon the party, in permitting the vendor to escape from a due and strict fulfilment of such agreement.

The case before us is the very one put by Judge Story. Here was a verbal contract, clearly established, and not denied, in any respect, by the defendants. The plaintiff was admitted into possession under that contract, and has built houses and made other improvements on the land, with a confidence in the due completion of the contract; and to permit the defendants now to deprive him of the land, and also of his improvements, would, it appears to us, be suffering a manifest fraud to be practiced upon him.

The only serious doubt about this branch of the case is, whether the plaintiff was admitted into possession. One great difficulty, in the way of the recovery in *Hoen* v. *Simmons et al.*, was that it appeared that the party asking specific performance, although he claimed that he had entered under the contract, and had thereby, as we held, precluded himself from contesting the title of the other party, had, nevertheless, taken possession without the knowledge, permission or consent of the adverse party. In this case, there is no doubt that the plaintiff entered under

the contract. Did he take possession with the consent of his vendor? We think, that the delivery of the title deeds of the property was equivalent to a delivery of, and admission into, the possession, as between vendor and vendee, whatever might be its effect in conferring *actual possession* in case the rights of third persons were concerned. Here was the delivery of a sign or symbol, which, as between the parties, was equivalent to a delivery of the possession of land, which was wholly unoccupied.

But the appellants say, that the case agreed upon does not find the delivery of the title deeds. It is true that it does not state that fact in so many words, but it does state facts which demonstrate to a moral certainty, that the deeds were delivered at the time of the contract. The inserting of these facts in the statement would be wholly unmeaning, unless it was for the purpose of showing such delivery of the evidences of title. Besides, if it were improper for us to draw such inference from the facts, all we could do would be to remand the cause for a new trial, in which case no jury could avoid finding this very fact from the evidence. We think it useless to put the parties to the additional trouble and expense of a new trial, when we see clearly that, after perhaps a protracted litigation, the result must be the same as the conclusion to which we have come.

Judgment affirmed.

HART *vs.* SPALDING.

In an action against a common carrier for the non-delivery of goods, the value thereof at the port of discharge is the proper measure of damages. The rule asserted in *Ringgold* v. *Livingston et al.* (*ante*, *p.* 108,) affirmed.

An attorney, by virtue of his retainer and general control over a cause in court, has the power to bind his client, by consenting to an order of the court; and in case of such consent being given by the attorney, it cannot, after the order has been made, be revoked by the client.

APPEAL from the court of First Instance of the district of San Francisco. The action was against the defendant as a common carrier for the non-delivery of goods. All necessary facts are stated in the opinion of the court.

E. Temple Emmett, for plaintiff.

Alexander Wells, for defendant.

By the Court, BENNETT, J. It is difficult from the papers before us to determine the exact rights of the parties. It would seem, however, that the suit was brought to recover the value of goods claimed by the plaintiff as assignee of a bill of lading. The plaintiff upon this hypothesis, if entitled to recover at all, had a right to a judgment for the full value of the goods at this place, the port of delivery. (*Ringgold* v. *Livingston et al.* decided at the last term of this court, *ante*, *p.* 108.) The court of First Instance decided that the plaintiff should recover the invoice price of the goods, or, at his election, should receive the goods themselves delivered within a certain time at high water mark. The plaintiff, by his attorney, elected, in the presence of the court, to take the goods, which election was entered of record. The attorney had the power by virtue of his retainer and general control over the cause to make such election; and the subsequent revocation by the plaintiff, is of no importance. The only question, therefore, in the case, is, whether the defendant delivered the goods according to the judgment of the court and the election of the plaintiff. If he did, the plaintiff is not entitled to recover; if he did not, the plaintiff should recover the value of the goods. The cause should be remanded back to the district court for the determination of this point.

Ordered accordingly.

Harman vs. Harman.

By the Mexican law, marriage lawfully contracted in the face of the Catholic church and between members thereof, cannot be dissolved by the civil tribunals. But the union of man and wife without the sanction of the church is regarded as a mere civil contract, and, as such, falls within the legitimate sphere of the ordinary jurisdiction of the court of First Instance.

Appeal from the court of First Instance of the district of San Francisco. The action was brought by the wife against the husband for a divorce, on the ground of adultery, cruel treatment, &c., and a judgment of divorce and division of property was rendered by the court below, from which the defendant appeals.

Mr. Holmes, for plaintiff.

Wilson Shannon, for defendant.

By the Court, Bennett, J. By the Mexican law, which follows the canon law in this particular, marriage lawfully contracted in the face of the Catholic church, according to its rites and ceremonies and between members thereof, and finally consummated, is elevated to the rank of a sacrament and cannot be dissolved by the civil tribunals. On the other hand, the union of a man and woman, in the character of husband and wife, without the sanction of the church, when both of them belong to the class of the *unfaithful*, is considered as a *mere civil contract; el matrimonio de los infieles se considera solo como un simple contrato.* (*Escriche Dic. de Leg. Art.* "*Matrimonio,*" "*Divorcio.*")

There is nothing in this case showing that either of the parties belonged to the privileged class of the *faithful*, or that their nuptials were celebrated with the rites of the Catholic church. Their union, therefore, not having attained the sanctity of a sacrament,

should be regarded as a civil contract, and as such, like other contracts, it comes within the legitimate sphere of the ordinary jurisdiction of courts of First Instance.

The grounds for a dissolution of the contract between the parties to this suit, and for a division of the property jointly acquired by them, have been submitted to, and passed upon by, the court of First Instance and a jury, and we cannot say that they have gone astray in their conclusion.

Judgment affirmed with costs.

MENA vs. LE ROY *et al.*

Alcaldes in the departments of California, New Mexico, and Tabasco, were empowered to perform the functions of judges of First Instance in those districts where there were no judges of First Instance; and the Alcalde of San Francisco had the jurisdiction and powers of a judge of First Instance previous to the appointment of such officer.

APPEAL from the court of First Instance for the district of San Francisco. The only question of importance presented by the case was as to the jurisdiction and powers of Alcaldes. The cause was twice argued. On the first argument the papers returned to this court were of the most loose and unsatisfactory character, and on this account principally, the cause was remanded for a new trial. A motion was thereupon made for a re-hearing; the court being furnished with another return from the clerk of the court below, containing many papers not included in the first return. The facts of the case are sufficiently stated in the two opinions of the court. The cause was argued by

Horace Hawes, for plaintiff.

R. A. Wilson, for defendants.

By the Court, BENNETT, J. It appears from the papers in this case that some kind of a proceeding, either by way of *conciliacion* or in the nature of a formal suit, was institnted by the plaintiff Mena against the "master and owners of the ship "*Rolland*," on the 20th day of June, 1849, before the Alcalde of San Francisco. Three persons were appointed as a jury or as arbitrators to try the cause, who rendered their verdict or award in favor of the plaintiff for $1000, against the "ship "*Rolland* and owners," upon which judgment was rendered by the Alcalde on the 22d day of June. For what the action was brought nowhere appears, nor does it appear that there were any pleadings in the cause on either side. On the 22d day of June, a citation was issued directed to Victor Le Roy, requiring him to show cause why he should not pay "out of "the freight of the ship *Rolland* a certain debt of $1000 of "sentence of court." Le Roy appeared in pursuance of this citation, and on the same day "was discharged from liability," and the plaintiff required to pay the costs. It does not appear in whose favor or upon what ground this proceeding was commenced against Le Roy, or for what reason he was "discharged "from liability."

On the 30th day of June, another citation was issued, directed to Victor Le Roy, Henry Raymond and Alfred Price or Perri, commanding them to show cause on the 2d day of July why they should not pay the above-mentioned judgment against the master and owners of the ship *Rolland*, and of the proceeds of the freight of that ship. This process was served, as appears from the return of the sheriff, "by delivering to the said *Victor* "*Le Roy* a true and attested copy of the same."

It appears that there was some kind of a trial before the Alcalde on the 2d day of July, upon the conclusion of which he rendered a judgment in the following words: "It appearing "that defendant had received $3400 freight of ship *Rolland*, "and had paid the captain or master $2040, part of it since "the date of the receipts, but the lien of the shippers attaching

"upon delivery on board and receipt for cargo; it is ordered "that consignees in default of ship, and under the circumstances "of the case, pay the judgment of $1000 and costs."

The receipts referred to in the above judgment are two receipts, the one, dated June 16, 1849, for 1440 *piasters*; and the other, dated May 30, 1849, for 1600 *piasters*, signed by the master and acknowledging the receipt from Le Roy of the respective sums therein mentioned.

On the 13th day of July, an execution was issued by the Alcalde upon the above judgment against Le Roy, Raymond and Perri, on which the sheriff returned that he had "levied "on the lot on which Victor Le Roy's store is situated, fronting "on Montgomery street, between Clay and Washington streets."

In this stage of the proceedings the cause appears to have been transferred to another Alcalde, and by him, on the 10th day of November, to the court of First Instance, from which a citation was issued on the 22d day of January, 1850, which, after reciting the judgment rendered by the Alcalde, required Le Roy, Raymond and Perri "to show cause why execution "should not be had of the above judgment." This citation was served on Le Roy and Raymond, but not on Perri. On the 28th day of January, Le Roy appeared by his attorney, and on the 7th day of February the court of First Instance, "on hear-"ing proofs in the case," rendered judgment "against Victor "Le Roy *et als*" for $1221,40. At the trial in the court of First Instance, the plaintiff offered in evidence "the petition, "judgment, and order extending the judgment to Victor Le "Roy, consignee." Le Roy objected to the reading of them in evidence on the ground that the order or judgment of the Alcalde "was unjust, and contrary to the law and evidence, "and that he was, on this trial, entitled to a trial *de novo* and "to show and make his defense." The objection was overruled, the court holding, "that if defendant could show payment or "satisfaction, or that said judgment was obtained through fraud, "he might do so," but that he "could not go behind the tran-"script of said judgment." These are substantially the facts of the case, so far as we can gather them from the loose and

disjointed fragments, which have been dignified with the name of a record. From the judgment of the court of First Instance this appeal is brought.

It is impossible to determine what the real merits of the cause were before the Alcalde, on account of the informal and irregular character of the proceedings; but so far as we have been able to get at them, we are forcibly impressed with the idea that the judgment was rendered under a mistaken notion both of law and of fact; of law, for we see nothing in the proceedings to show that there was any legal or equitable cause of action against the defendants; and of fact, because it appears that the Alcalde did not give the defendants a sufficient credit into $1000 for their payments to the master of the vessel. The receipts show a payment of $3040, and the Alcalde allowed only $2040. They bear date before the commencement of the proceedings against the defendants, and we see no reason to suppose that they were ante-dated.

The scraps of paper, which were transferred from one Alcalde to another until they finally found a resting place in the court of First Instance, are of a character too uncertain to be entitled to the binding force and effect of a final judgment, which shall preclude all inquiry into the validity of the plaintiff's original claim. The decision of the Alcalde was based upon no complaint, declaration or bill setting forth the plaintiff's cause of action, but merely upon the "circumstances of the case;" and, after a diligent examination, we can scarcely procure a glimpse of light into the nature of his demand. It would be difficult to say that such a decision could be pleaded in bar of an action against the defendants for any cause whatever—and if not, the court of First Instance should have allowed an inquiry into the original demand.

The case, upon the whole, seems to be one in which it would be proper for the court to exercise the power conferred on it by the act of Feb. 28, 1850, to grant a new trial where the record presents no "tangible point" for decision, with instructions to the district court to require the parties to form an issue upon

regular pleadings in the same manner as if the cause had been commenced in that court.

Ordered accordingly.

By the Court, on re-hearing, BENNETT, J. Our former judgment in this case was founded chiefly upon the ground that the papers, which had been furnished to the court, were insufficient to enable us to determine for what the suit was brought, or what was the defense, or on what ground the Alcalde rendered judgment. On the present argument, the papers which were wanting on the last, have been supplied. We have now before us a complaint setting forth a good cause of action, an answer to that, the record of a trial, and the evidence given on such trial which sustains the cause of action set forth in the complaint.

Until recently we had been unable to procure accurate knowledge respecting the jurisdiction of Alcaldes in civil suits. From the light which we had, we came to the conclusion that they had not jurisdiction over causes where the amount in controversy was more than a hundred dollars. This is, in truth, the extent of their jurisdiction under the decree of 1837, and forms, at the present time, the limit of their powers in most of the Departments of the Mexican republic. But by articles 26, 27, and 28, of a decree made on the 2d day of March, 1843, Alcaldes and justices of the peace in the Departments of California, New Mexico and Tabasco, were empowered to perform the functions of judges of First Instance in those districts in which there were no judges of First Instance. (*No.* 604 *of the Collection of Decrees of* 1842 *and* 1843.) At the time the judgment was rendered in this cause by the Alcalde, there was no judge of First Instance in the district of San Francisco, and, accordingly, under the decree above cited, the Alcalde had jurisdiction. The Alcalde having had jurisdiction over the cause, there does not appear to be anything in the action of the court of First Instance for which the judgment should be reversed. It is, therefore, affirmed.

Ordered accordingly.

MATEER *vs.* BROWN.

The decision in *Ringgold* v. *Haven*, (*ante*, *p.* 108,) that the power of compulsory nonsuit exists, approved.

Where a party moves for a nonsuit upon a specific ground, he cannot, on appeal, assume a different position.

If the evidence of the plaintiff will not authorize a jury to find a verdict for him, or, if the court would set it aside, if so found, as contrary to evidence, it is the duty of the court to nonsuit the plaintiff.

The declarations of an agent or servant are admissible in evidence against the principal, only when they form a part of the *res gestæ;* and the declarations of a barkeeper to a third person, as to the contents of a package left by a guest in the charge of the innkeeper, when not made, in any way, in the discharge of his duty as barkeeper, are not admissible in an action against the innkeeper to prove the contents of the package.

An innkeeper, like a common carrier, is the insurer of the goods of his guest, and is bound to keep them safe from burglars and robbers without, as well as from thieves within, his house: but he can be held to this strict liability only for such goods as are brought into his house by travellers in the character of guests.

Calye's case, (8 *Rep.* 164,) commented on; and *Burgess* v. *Clements*, (4 *M.* & *Selw.* 306,) and *Dawson* v. *Chamney*, (5 *Adoph.* & *Ell. N. R.* 164,) overruled.

APPEAL from the district court of the fourth judicial district. The action was brought to recover $5500 worth of gold dust, claimed to have been lost in the inn of the defendant, while the plaintiff was staying there as a guest. All the important facts of the case will be found in the opinion of the court.

Calhoun Benham, for plaintiff.

Mr. Parburt, for defendant.

By the Court, BENNETT, J. It was decided, at the last term, in the case of *Ringgold* v. *Haven & Livingston*, that the power of compulsory nonsuit exists. We think the rule convenient, reasonable, and well supported by authority, and we shall adhere to it. On the trial of this cause, after the plaintiff had closed his evidence, the defendant moved for a nonsuit, "on the

"ground that the plaintiff had not proved by competent testi-"mony the loss of any property of definite value." This being the only position taken in support of the motion, unless that be tenable, the nonsuit was properly refused, notwithstanding there may have been other good and sufficient reasons, for which, if urged at the proper time, it might have been demanded. A party making his motion on one ground, thereby impliedly waives all others. He cannot avail himself of a different position, on appeal, from that which he assumed in the court below. This doctrine is well established, and is necessary to be sustained, in order that the plaintiff may not be misled in the course of the trial, and in the settlement of his bill of exceptions in case the nonsuit should be ordered.

The general rule by which courts should be guided in determining whether a nonsuit, when applied for, should be ordered, is, that if the evidence given by the plaintiff would not authorize a jury to find a verdict for him, or, if the court would set it aside, if so found, as contrary to evidence, in such case it is the duty of the court to nonsuit the plaintiff. (1 *Wend.* 376; 6 *id.* 436; *Ringgold* v. *Haven & Livingston*, *above cited*, *ante*, *p.* 108.)

Let us apply these rules to the case before us. We must, however, first remark, that the question of the admissibility of the evidence objected to, is one, with which, in determining the point now under consideration, we have nothing to do. Assuming, then, that the evidence was admissible for the purpose of affecting the defendant, was it of such weight that a jury might legally and properly infer from it that the plaintiff had "lost any property of a definite value?"

Dexter, one of the witnesses for the plaintiff, testified that Higgins, the barkeeper of the defendant, stated in a conversation between them, "that the plaintiff had made his pile," and that, on opening a closet and raising a bundle, he said "it was the plaintiff's, and that it was about six thousand dollars." If this be legal evidence for any purpose, then, certainly, a jury might infer from it the value of the contents of the bundle. The evidence to prove the loss is not quite so strong; but it

seems, from the course of the trial, that this was an uncontested and admitted point, and that the jury would have been warranted in finding the affirmative from the circumstances proved. The nonsuit was therefore properly refused.

We cannot review the propriety of the refusal to nonsuit on the ground that the plaintiff did not show himself to have been a guest in the house, because the motion for nonsuit was put upon a different ground.

The next question is as to the admissibility of the evidence objected to. Higgins was the barkeeper of the defendant when the gold dust, as is claimed, was received into the inn, and during the subsequent time down to the loss. It was argued by the plaintiff's counsel, that, as Higgins was the agent of the defendant, the latter was bound by his declarations touching the subject matter in controversy. The following questions were put to the witness Dexter: "State what you heard Hig- "gins the barkeeper say with regard to any money or gold dust "received from Mateer;" and "State what Higgins said at the "time about the robbery." These questions or directions, the court, after objection by the defendant, permitted to be answered. It is asserted that the testimony given in reply to these directions, was admissible as a part of the *res gestæ*. At the same time it is conceded that the declarations of Higgins, thus proved, were not made at the time of the delivery of the gold dust by the plaintiff and the receipt of it by the defendant. Thus the question is presented, whether the declarations of an agent or servant made to a third person concerning a deposite of which he has charge for his principal, at any time during the continuance of such charge, are competent evidence against the principal.

Greenleaf, (1 *Law of Ev.* 126,) says that "where the acts of "the agent will bind the principal, there his representations, "declarations, and admissions, respecting the subject-matter, "will, also, bind him, if made at the same time, and constitut- "ing a part of the *res gestæ*. They are of the nature of original "evidence, and not of hearsay; the representation or statement "of the agent, in such cases being the ultimate fact to be proved,

"and not an admission of some other fact. But it must be "remembered, that the admission of the agent cannot always "be assimilated to the admission of the principal. The party's "own admission, whenever made, may be given in evidence "against him; but the admission or declaration of his agent "binds him only when it is made during the continuance of the "agency, in regard to a transaction then depending, *et dum* "*fervet opus*. It is because it is a verbal act and part of the "*res gestæ*, that it is admissible at all; and therefore it is not "necessary to call the agent himself to prove it; but wherever "what he did, is admissible in evidence, there it is competent "to prove what he said about the act while he was doing it." As to any other facts, in the knowledge of the agent, he must be called to testify, like any other witness. (*Id.* 134.)

Were the declarations of Higgins a part of the *res gestæ*, according to the above rules? We think not. There was no act done by him, in his character of agent, at the time of making them, which would have been admissible evidence against the defendant, and which such declarations were calculated to qualify or explain. They were not made at the time he received the deposite; had they been then made, they would, perhaps, have been competent. They were made when Higgins took the bundle out of the closet to exhibit it to a stranger. This was not done by him in the discharge of his duties as agent, and the declarations accompanying that act were but hearsay. It is impossible to tell what weight this improper evidence had on the mind of the court, in forming its judgment. We cannot clearly see that it had no effect, and, consequently, a new trial must be granted.

As the cause is to be re-tried, it is proper that we should express our views in relation to the other points in the case. The defendant insists that he is not liable in consequent of certain rules, adopted by him for the government of his house, and a copy of which he kept posted up in his bar-room. The 11th of these rules was as follows:—"The proprietor will not be accountable for any boxes, bundles, bags, trunks, chests, "clothing, specie, gold dust, bullion, or any other articles or

" material whatever, unless delivered to his especial care, and " a receipt given for the same."

It is unnecessary to determine whether an inkeeper, any more than a common carrier, can limit his legal responsibility by notice, or, if he can, whether it is not essential that actual knowledge of the notice should be brought home to his guest; inasmuch as we think that the requirement of the notice in this case was, so far as the plaintiff had any thing to do, complied with. The delivery of the bundle to the barkeeper and agent of the proprietor, was a delivery to the "especial care" of the proprietor, within the meaning of his regulation; and the plaintiff ought not to suffer from the neglect of the barkeeper to give a receipt.

The remaining questions relate to the general principles on which the liability of innkeepers is based. It is claimed by the defendant that his house was burglariously entered, the barkeeper overcome by force, and the property carried off by robbers; and that these circumstances exonerate him from liability. The question, then, is, whether robbery from without, or burglary, will excuse an innkeeper for the loss of the goods of his guest; and the answer to it does not appear to be settled by the authorities.

Chancellor Kent, (2 *Comm.* 591,) says that innkeepers are responsible to as strict and severe an extent as common carriers, while, in another place, (*id.* 593,) he limits their responsibility to losses occasioned otherwise than by inevitable casualty, or by superior force, as robbery. Judge Story, in his work on bailments, (*sec.* 472,) says, that innkeepers are not responsible to the same extent as common carriers; that the loss of the goods of a guest, while at an inn, will be presumptive evidence of negligence on the part of the innkeeper or of his domestics; but that he may, if he can, repel this presumption, by showing, that there has been no negligence whatever, or that the loss is attributable to the personal negligence of the guest himself; or that it has been occasioned by inevitable casualty or by superior force. Thus, he continues, although a common carrier is liable for all losses occasioned by an armed mob, (not being public

enemies,) an innkeeperis not, (*as it should seem*,) liable for such a loss. Neither is he liable, (*it should seem*,) for a loss by robbery and burglary by persons from without the inn. It will be observed that the commentator advances this latter doctrine with some degree of hesitation and doubt, and in language which implies that he did not himself consider it as settled. Sir William Jones, in his essay on bailments, (*p.* 94,) says, it has long been holden that an innkeeper is bound to restitution, if the trunks or parcels of his guests, committed to him either personally or through his agents, be damaged in his inn, or stolen out of it by any person whatever; and yet, he says, (*p.* 96,) that it is competent for the innholder to repel the presumption of his knavery or default, by proving that he took *ordinary* care, or that the force which occasioned the loss or damage was truly irresistible.

It thus appears, that, while Judge Story leaves the point under consideration at loose ends, the two other distinguished commentators above cited are still more uncertain, as neither of them apparently agrees with himself; and from their opposing rules, it is difficult to determine to which side of the question they intended to adhere. The contradiction found in the writings of commentators, as well as the diversity which exists in the decisions on which their various statements are rested, seem to have sprung out of a departure from the principles on which the extraordinary liability of innkeepers and common carriers is based, and from what appears to be an erroneous construction put upon the doctrine laid down by Lord Coke in *Calye's case*, (8 *Rep.* 32.) Thus Judge Story and Chancellor Kent, in support of the position that an innkeeper is not liable for a loss of the goods of his guest occasioned by robbery and burglary, rely in part, at least, on the authority of *Calye's case*, while Sir William Jones cites no authority whatever in support of the strange proposition that the innholder may escape from responsibility by proving that he took *ordinary* care of the goods of his guest. Following in the track of the same departure from principle, in which commentators have wandered, are several decisions of recent date. Such are *Burgess* v. *Cle-*

ments, (4 *M. & Selw.* 306;) and *Dawson* v. *Chamney*, (5 *Adolph. & Ell. N. R.* 164.) The tenor of *Calye's case*, however, sanctions no such doctrine, although the particular passage in it, by which the lax rule of the responsibility of innkeepers is sought to be sustained, appears, at first sight, to be somewhat uncertain. It is there laid down, that the innholder shall not be charged, unless there be a *default* in him or his servants, in the *well and safe keeping and custody* of the guest's goods and chattels within his common inn; for the innkeeper is bound in law to *keep them safe*, without any stealing or purloining; and it is no excuse for the innkeeper to say, that he delivered the guest the key of the chamber in which he is lodged, and that he left the chamber door open; but he *ought to keep the goods and chattels of his guest there in safety*. But if the guest's servant, or he who comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged; for there the fault is in the guest to have such companion or servant. So, also, if the innkeeper require his guest to put his goods in such a chamber under lock and key, and then he will warrant them, otherwise not, and the guest lets them lie in an outer court, where they are taken away, the innkeeper shall not be charged, for the fault is in the guest. Lord Coke is here commenting on the writ in the *Register Brevium*, which recites that, by the custom of the realm, innkeepers are obliged to keep the goods and chattels of their guests, which are within their inns, without subtraction or loss, day and night, so that no damage, *in any manner*, shall thereby come to their guests, from the *default* (*pro defectu*) of the innkeeper or his servants.

The reasoning of Coke is simply this. The innkeeper is bound by law to keep the goods of his guest *safely;* if he does not perform this obligation, the law, which imposes on him the responsibility, declares him to be in default; but if the loss of the goods be ascribable to the fault of the guest, then the innkeeper is excused, for the words of the writ are *from the default of the innkeeper or his servants*. He makes no distinction between losses occasioned by superior force, by robbery by persons

within the house and persons from without, by secret theft, or by an armed mob. On the other hand, he apparently discountenances the distinction; for he says, "these words *absque subtractione seu omissione*, extend to all moveable goods, although of them felony cannot be committed; for the words are not *absque felonica captione*, &c., but *absque subtractione*, &c. It strikes us forcibly that the uncertainty and confusion which have been thrown over this branch of the law have arisen from confounding the word *defectu* in the writ, and the word default used by Lord Coke as its translation, with the term negligence; an error into which Judge Story himself seems to have fallen. (*Story on Bailments, sec.* 470.) The question of negligence does not, acccording to the language of the writ in the *Register Brevium* or the Commentary of Coke, constitute a subject for discussion in ascertaining the responsibility of innkeepers, any more than it does in ascertaining that of common carriers. The law requires of the former to keep the goods safely, as it does of the latter to carry them safely, and in case either fails, from any cause, to comply with this legal obligation, the law pronounces him in default, unless the loss be occasioned through the fault of the owner of the goods, or by the act of God, or by the public enemies. It seems, therefore, that the dictum of Mr. Justice Bayley in *Richmond* v. *Smith*, (8 *Barn*, and *Cress.* 9,) is a concise and accurate summary of the doctrine of Calye's case. "It appears to me," he says, "that the innkeeper's liabil-"ity very closely resembles that of a carrier. He is *prima* "*facie* liable for any loss not occasioned by the act of God or "the king's enemies; although he may be exonerated where "the guest chooses to have his goods under his own care." And although that dictum has been overturned in England by the subsequent decision in *Dawson* v. *Chamney*, (5 *Adolph. & Ell. N. R.* 164,) we think the dictum right, and the decision wrong. Stephen, in his Commentaries, (2 *Comm.* 133,) says that an innkeeper is responsible for the goods and chattels brought by any traveller to his inn, in the capacity of guest there, in every case where they are lost, damaged, stolen, or taken by *robbery*, except where they are stolen by the traveller's own

servant or companion, or from his own person, or from a room which he occupied as a mere guest, or entirely through his own gross negligence; and Mr. Chitty, in a note to Blackstone's Commentaries, (1 *Comm.* 430, *note* 22.) declares it to be long established law, that the innkeeper is bound to restitution, if the guest is *robbed* in his house *by any person whatever;* unless it should appear that he was robbed under circumstances like those which, as above seen, constitute admitted exceptions. In the recent case of *Mason* v. *Thompson*, (9 *Pick.* 280, 284,) it has been laid down in Massachusetts, that innkeepers, as well as common carriers, are regarded as *insurers* of the property committed to their care, and are bound to make restitution for any injury or loss, not caused by the act of God, or the common enemy, or the neglect or fault of the owner of the property. And in *Grinnell* v. *Cook*, (3 *Hill*, 488,) Mr. Justice Bronson states the rule in the following words: "The innkeeper is bound "to receive and entertain travellers, and is answerable for the "goods of the guest, although they may be stolen or otherwise "lost *without any fault on his part.* Like a common carrier, "he is an *insurer* of the property, and nothing but the act of "God or public enemies will excuse a loss." It thus appears that some courts as well as commentators are, at length, returning to the sound and healthy principle of the common law, which places the liability of innkeepers and carriers on the same ground. And why should there be any distinction? "Rig-"orous as the law in relation to innkeepers may seem," says Sir William Jones, (*Bailments*, 95, 96,) "and hard as it may ac-"tually be in one or two particular instances, it is founded on "the great principle of public utility, to which all private con-"siderations ought to yield; for, travellers, who must be nu-"merous in a rich and commercial country, are obliged to rely "almost implicitly on the good faith of innholders, whose edu-"cation and morals are usually none of the best, and who might "have frequent opportunities of associating with ruffians or "pilferers, while the injured guest could seldom or never ob-"tain legal proof of such combinations, or even of their neg-"ligence, if no actual fraud had been committed by them."

Now, these are the very reasons assigned by the law for the extraordinary responsibility imposed on common carriers; and, the reasons for the rule being the same in both cases, there is, in principle, no propriety in making a distinction. We think that an innkeeper is bound to keep the property of his guest safe from burglars and robbers without, as well as from thieves within, his house.

One point further remains to be considered. It appears from the testimony, that the bundle, which is claimed to have contained the gold dust, was not taken to the defendant's inn until several days after the plaintiff became his guest. As, in order to entitle the plaintiff to recover, it is necessary for him to establish his character of guest in the inn of the defendant, so also it is equally necessary that it should appear that his goods were taken there in the capacity of guest. (2 *Stephen's Comm.* 133.) The liability of the innkeeper results from the relation of guest in which the traveller stands to him, and extends only to those things which properly pertain to him in that relation. (*Calye's case* above cited.) It does not necessarily follow that the strict responsibility can be imposed on an innkeeper for all property, which his guest may choose to bring into the inn, after he has been received *infra hospitium;* or that the latter may make the former a compulsory depositary of any amount of goods or treasure, which, during his sojourn in the inn, he may desire to keep secure. The innkeeper is bound by law to receive the traveller and his goods, and, for a refusal, in case he has sufficient accommodations for him, he is liable not only to an action on the case for the private damage, but to indictment for the public wrong. (3 *Blackstone's Comm.* 164; 4 *Stephen's Comm.* 296, *note n.*) Inns are instituted for passengers and wayfaring men; and the keepers thereof can be held to the strict legal liability only for such goods as are brought into their inns by travellers in the character of guests. It would be too great a responsibility if that liability could be extended so as to cover any conceivable amount of money or gold dust, which the traveller, after he has become a guest, might be disposed to thrust into the custody of his host, and thus compel him to become the

insurer of its safety. We think, in this case, it is a question which the jury should decide, whether the bundle was taken to the inn of the defendant by the plaintiff in his character of guest, in which event the defendant's liability would cover all losses, or whether, after the plaintiff became a guest with the defendant, it was deposited there in the nature of an ordinary bailment, in which case the defendant would be bound to exercise no more, at the farthest, than ordinary diligence, and would be answerable, certainly, for nothing more than ordinary neglect.

New trial granted, costs to abide the event.

MATEER *vs.* BROWN.

This court retains control of a cause on appeal, until the *remittitur* is filed with the court below. 1 Selden R. 455

The case of *Grogan & Lent* v. *Ruckle*, (*ante*, *p.* 193,) affirmed.

Where a judgment is founded in part on incompetent evidence, it will be reversed on appeal, unless it can be clearly seen that the improper evidence could have had no influence on the minds of the jury.

THIS was a re-hearing of the case of *Mateer* v. *Brown*, (*ante*, *p.* 221.)

Calhoun Benham, for plaintiff.

Mr. Parburt, for defendant.

By the Court, BENNETT, J. A re-hearing having been granted in this case, it has been a second time argued. It is objected that the court has not the power to review its former judgment. The *remittitur* not having been sent to, nor filed with, the court below, we still have control over the cause. (*See Grogan & Lent* v. *Ruckle*, *ante*, *p.* 193, *and cases there cited.*)

The counsel for the plaintiff asks us to modify our former

judgment, and decide that certain facts were proved at the trial, by evidence independent of that which we held in our former decision to be incompetent. The determination whether such facts were proved or not, was peculiarly within the province of the jury, or the district court sitting as a jury. What weight the improper evidence had on the mind of the district judge in coming to the conclusion which he arrived at, we cannot determine; and where a judgment is founded in part on incompetent evidence, unless we can clearly see that it had no effect, the judgment is erroneous. (*Trimble* v. *Thorner*, 16 *John.* 89; *Osgood* v. *Manhattan Co.* 3 *Cow.* 612.) Our former decision must stand.

Ordered accordingly.

THE PEOPLE, *ex rel.* THE ATTORNEY GENERAL, *vs.* NAGLEE.

The state has the power to require the payment by foreigners of a license fee for the privilege of working the gold mines in the state.

The act of the legislature, prohibiting foreigners from working the gold mines, except on condition of paying a certain sum each month for the privilege, *held*, not to be repugnant to the constitution of the United States, or the constitution of this state, or the treaties of the United States with foreign powers.

Under the treaty of Querétaro, all Mexicans "established" in California on the 30th day of May, 1848, and who had not, on or before the 30th day of May, 1849, declared their intentions to continue Mexican citizens, are to be deemed American citizens.

The 13th section of the 11th article of the state constitution, which declares that taxation shall be equal and uniform throughout the state, applies only to direct taxation upon property, and does not prohibit the legislature from enacting license laws.

APPEAL from the superior court of the city of San Francisco. The proceeding in this case was an information in the nature of a *quo warranto* instituted by the attorney general against the defendant, the object of which was simply to procure the opinion of the court upon the constitutionality of the law requiring foreigners to pay a license fee of twenty dollars a

month for the privilege of working the gold mines in this state. The complaint alleged that the defendant had acted as a collector of license fees to foreign miners, and had exacted sums of money from different individuals, who were foreigners, for the privilege of working the gold mines of the state. A demurrer was put in to the complaint, and judgment was given in the superior court in favor of the defendant. From this judgment an appeal was taken. The cause was argued in this court by

S. Heydenfeldt, for the attorney general.

Wm. Smith and *E. Randolph*, for defendant.

By the Court, BENNETT, J. The legislature, at its last session, passed an act, requiring foreigners, in order to entitle them to the privilege of mining in this state, to procure a license for that purpose, and prohibiting all foreigners, who had not such license, from working the mines.

It will be unnecessary to examine the questions in relation to the authority of the attorney general to institute the suit, and whether this form of proceeding is an appropriate method to test the constitutionality of the statute; inasmuch as we have to come the conclusion, that the judgment of the superior court should be affirmed, irrespective of the correctness of the respondent's positions upon these points.

The points on the part of the appellant, which will be considered, are, that the act of the legislature is in conflict; first, with the constitution of the United States; secondly, with treaties of the United States with foreign nations; thirdly, with the treaty of Querétaro in particular; and fourthly, with the bill of rights and the constitution of California.

First. Does the act in question violate the constitution of the United States? The appellant contends that it is an usurpation of the powers conferred upon Congress by that instrument. Before proceeding to an examination of this position, it is deemed advisable to recur to a few principles and rules of interpretation, which define the limits of the powers conferred upon

Congress by the constitution, and of those which the states still continue to retain. The general government, though supreme within its constitutional sphere, is yet limited in the objects of its jurisdiction, and in the extent of its authority. So far as the constitution has, either expressly or by necessary and unavoidable implication, conferred upon it exclusive powers, to that extent state rights and state authority are subordinate; but no farther than it can point out its authority in the constitution, does its jurisdiction extend—over everything beyond, state legislation is supreme. In determining the boundaries of apparently conflicting powers between the states and the general government, the proper question is, not so much what has been, in terms, *reserved* to the states, as what has been, expressly or by necessary implication, *granted* by the people to the national government; for each state possesses all the powers of an independent and sovereign nation, except so far as they have been ceded away by the constitution. The federal government is but the creature of the people of the states, and, like an agent appointed for definite and specific purposes, must show an express or necessarily implied authority in the charter of its appointment, to give validity to its acts. In order, therefore, to maintain the position, that a state has not the power to do a given act, which, without a transgression of international law, falls within the scope of the powers of any independent nation, it is necessary to show that such power has been transferred, by the constitution, from the state to the federal government. These principles are so well settled and so universally recognized and admitted, that it is scarcely necessary to cite authorities in support or elucidation of them. But we will refer to a few. They were foreshadowed by the *Federalist*, (*No.* 32, *p.* 143, *Ed. of* 1837,) even before the adoption of the constitution. It was stated in this, that the state governments would clearly retain all the rights of sovereignty which they had before the adoption of the constitution of the United States, and which were not by that act *exclusively* delegated to the United States. This exclusive delegation, or rather alienation of state sovereignty, would only exist in three cases; 1st, where the constitution, in express

terms, granted an exclusive authority to the union; 2d, where it granted, in one instance, an authority to the union, and in another, prohibited the states from exercising the like authority; and 3d, where it granted an authority to the union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant. After the adoption of the constitution, so jealous were the states, lest their sovereignty should be entirely effaced by the general language of that instrument, that, at the first session of Congress, an amendment was proposed, which was subsequently ratified by the constitutional number of states, which declares, in explicit terms, that "the "powers not delegated to the United States, by the constitution, "nor prohibited by it to the states, are reserved to the states "respectively, or to the people." The judicial decisions of the supreme court of the United States, as well as of other courts, have not essentially varied the contemporaneous exposition of the constitution by the high authority of Hamilton. In *Calder* v. *Bull*, (3 *Dallas*, 386,) Judge Chase declared that the state legislatures retained all the powers of legislation which were not expressly taken away by the constitution of the United States. In *Sturges* v. *Crowninshield*, (4 *Wheaton*, 193,) the chief justice observed, that the powers of the states remained, after the adoption of the constitution, what they were before, except so far as they had been abridged by that instrument; and in *Houston* v. *Moore*, (5 *Wheaton*, 48,) Mr. Justice Story, in the course of the clear exposition of the constitution, which he gave in that case, remarked, that the sovereignty of a state, in the exercise of its legislation, was not to be impaired, unless it was clear that it had transcended its legitimate authority; and that no power ought to be sought, much less to be adjudged, in favor of the United States, unless it was clearly within the reach of its constitutional charter. "We are not," he adds, "at liberty to add one jot of power to the national government "beyond what the people have granted by the constitution." The same principle has been recognized in various other decisions on constitutional questions by the supreme court of the United States. (2 *Cranch*, 397; 3 *Wheaton*, 386; 2 *Peters*,

245; 16 *Peters*, 627, 655, 664; 11 *Peters*, 103, 132; 14 *Peters*, 579; 15 *Peters*, 509.)

These, then, being the rules, by which it is to be determined what the powers of the national government are, and what powers still remain with the states, it is necessary, in the next place, to inquire, how far the states have surrendered the power of taxation to the general government, and to what extent they still retain that attribute of independence and sovereignty. With the exception of exports, imports and tonnage, and such things as are held by the United States government, where its rights might be impaired if the property was taxed by the states, it seems to be conceded by most American jurists that the power of taxation exists in the states to the full extent in which it may be exercised by any sovereign nation. In support of this may be seen the following authorities: *McCulloch* v. *Maryland*, 4 *Wheaton*, 316, 425; *Gibbons* v. *Ogden*, 9 *Wheaton*, 1; *Providence Bank* v. *Billings*, 4 *Peters*, 561; *Brown* v. *Maryland*, 12 *Wheaton*, 441; 2 *Story's Comm. on Constitution*, 437; *License cases*, 5 *Howard*, 588. The power of taxation, in independent nations, is unrestricted as to things, and, with the exception of foreign ambassadors and agents, and their retinue, is unlimited as to persons; and is deemed a power indispensable to their welfare and even their existence. The several states may, therefore, subject to the above restrictions, tax everything within their territorial limits, and every person, whether citizen or foreigner, who resides under the protection of their respective governments.

In the cases of *Norris* v. *The City of Boston*, and *Smith* v. *Turner*, (7 *Howard*, 283,) it was held by the supreme court of the United States, that, so long as foreigners emigrating to our country remained on board of the ships in which they were "imported," they were properly to be considered as embraced within that provision of the constitution which empowers Congress to regulate foreign commerce, and were, therefore, exempt from state taxation. But in those cases, it was conceded by the judges, as well by those of the majority as of the minority, that after the passengers had landed and become intermingled with

citizens, they were subject to be taxed by the state. In the case of *Smith* v. *Turner*, above cited, Mr. Justice McLean observes, (*p.* 405,) that, when merchandise was taken from the ship, and became mingled with the property of the people of the state, it was, like other property, subject to the local law, and that the *same rule applied to passengers.* And he adds, " when they " leave the ship and mingle with the citizens of the state they " become subject to its laws." Mr. Justice Catron, in the same case, (*p.* 452,) declares it to be a truism not open to denial, that the states may tax all persons and property within their respective jurisdictions, except in cases where they are affirmatively prohibited; and he adds, " certainly the states may tax their " own inhabitants at discretion, unless they have surrendered " the power." Mr. Justice McKinley impliedly concedes the same thing, for he says, (*p.* 455,) " that passengers can never be " subject to state laws until they become a portion of the popula- " tion of the state, temporarily or permanently." These are the opinions of the judges who were in the majority and carried the restrictions upon the state power of taxation to the farthest verge. Those who were in the minority are even more explicit. The Chief Justice, in his opinion, says, (*p.* 491,) " it is admitted " that they, (passengers who were foreigners,) are not exempt " from taxation after they are on shore." Mr. Justice Daniel observed in substance, (*p.* 501,) that a tax upon a person placing himself within the sphere of the taxing power, was purely an exercise of the great indefeasible right of taxation, which had been explicitly said by that court would extend to *every subject*, but for the restriction as to imports and exports imposed by the constitution. The same judge again says, (*p.* 515,) that that court had asserted the power of taxation, with the single exception of taxes upon imports, to be the *perfect* and *undiminished* and *indispensable* power of a sovereign state. And Mr. Justice Woodbury, (*p.* 531,) declares it to be conceded, that if the tax in question in those cases, as a tax, had not been imposed till the passenger reached the shore, the objection to the validity of the law must fail.

The above, then, being the inherent power of taxation in

every independent community, and this power not having been parted with by the people of the states when they organized the federal government, it consequently extends to all persons within the territorial jurisdiction of the respective states, and embraces foreigners residing therein as well as citizens. The power being conceded, the limitation and extent thereof must, as to subject matter, persons, amounts, and times of payment, rest in the discretion of the government of each state; and if a state, enacting laws in pursuance of this acknowledged power, sees fit to impose the burden of taxation upon a portion of the persons within the sphere of its jurisdiction, and specially exempt others, its legislation, even though it might be unequal and unjust, would yet be no infringement of the constitution of the United States.

But it is claimed that the act of the legislature interferes with the power of Congress to make rules and regulations respecting the territory belonging to the United States. We are not aware that it has ever been supposed that individuals, living upon the public lands of the United States, whether as naked trespassers or claiming under a pre-emption right, were exempt from taxation by the state. A poll-tax upon them for state purposes, local taxes for highways, bridges, and objects of a like nature, have never, we apprehend, been deemed an interference with the power of Congress to make rules and regulations respecting the territory of the United States, even in those states where there has been an express provision in the Act of Admission, that the public lands should remain exempt from taxation while belonging to the United States, and for a certain period after they were sold. It can scarcely be doubted that our own state can, without any violation of this clause in the constitution —more especially as Congress has never attempted to avail itself of the exercise of the powers conferred upon it—levy a poll-tax to such extent as it might deem expedient upon all persons engaged in mining upon public lands, as well as upon the rest of her inhabitants; and if she might levy such tax upon all, there is nothing in the constitution of the United States, which deprives her of the power of imposing it upon a part only. Al-

though the state may not have the power to raise a revenue by direct taxation upon the public lands, or to make rules and regulations as to the surveying, leasing, or disposing of them, or as to the time or manner in which mineral lands may be worked, her power of taxation for police or municipal purposes, whether for the benefit of local districts or for the support of the state organization, must be co-extensive with the persons of all who enjoy the protection of her government, whether citizens or foreigners, whether occupying lands owned by themselves, or mining upon such portions as have not yet been severed from the national domain. To hold the reverse of this would be to hold, that miners upon the public lands might remain exempt from taxation, and that the burdens of government must fall entirely upon the rest of the community.

It does not follow that the act in question can be deemed a rule or regulation respecting the public lands, because it may affect them indirectly, and may, to a limited extent, operate to prevent the working of them, and thereby diminish the revenue which might otherwise be derived from them by the United States. To the general government is committed the power to regulate commerce with foreign nations, and among the several states; and yet the states constantly tax things connected with foreign commerce and domestic trade, and thereby affect them to a considerable degree. "They tax the timber, cordage, and "iron, of which the vessels for foreign trade are made; tax their "cargoes to the owners as stock in trade; tax the vessels as "property, and tax the owners and crew per head for their "polls." And although taxes upon such objects should be imposed to such an extent as to injure commerce materially, and even thwart the purposes of the general government, they would still conflict with no clause in the constitution. This was one objection raised against the license laws of Massachusetts, New Hampshire, and Rhode Island, (5 *Howard* 504, *et seq.*,) but the supreme court, unanimously, held that they were constitutional, though they evidently tended to diminish importations of spirituous liquors, and lessen the revenue of the general government from that source. But that being only an incident to them, and

not their chief design, and the chief design being within the power of the states, the laws were upheld. So the statute under consideration, even though it may incidentally affect the public lands, that not being its main object, is unobjectionable on that ground.

But again, conceding that the law is one which prescribes rules and regulations respecting the territory of the United States, it does not necessarily follow that it is invalid. The constitution confers this power upon Congress, it is true, but it does not declare it to be an exclusive power. The exercise of a similar authority by the states is not expressly prohibited, and is not absolutely and totally contradictory and repugnant to the power of Congress. The case, consequently, does not fall within either of the classes mentioned in the *Federalist*, in which the states are said to be deprived of their previous attributes of sovereignty. Congress had neglected, and, so far as we have any authentic information, still neglects, to exercise the powers conferred by the clause under consideration; and, in the absence of all legislation by Congress, a statute like the one in question can scarcely be considered as infringing upon this dormant and unexecuted power of the general government. Had Congress established rules and regulations for the mines, with which this act was in conflict, there would be more plausibility in the objection of the appellant. But the statute itself provides for its own suspension, the moment Congress shall interfere. The latter clause of the 6th section provides, that "such "foreigners may take out a new license, at the same rate per "month, until the governor shall issue his proclamation an- "nouncing the passage of a law by Congress, regulating the "mines of precious metals in this state;" and the 14th section is in the following words:—"It shall be the duty of the "governor, so soon as he shall have been officially informed of "the passage of a law by the United States Congress, as- "suming the control of the mines of the state, to issue his pro- "clamation, requiring all collectors of licenses to foreign miners "to stop the issuing of such licenses." There are many grants of power to Congress under forms of expression like the clause re-

specting the regulation of the public lands, which have been held not to confer upon the national government *exclusive* authority of legislation. Thus, Congress is empowered to provide for organizing, arming, and disciplining the militia; yet, in the absence of Congressional legislation upon the subject, the state may exercise the same authority. (*Houston* v. *Moore*, 5 *Wheat.* 1, 49.) Congress has exclusive power to regulate commerce; and yet, in *Wilson* v. *The Blackbird Bridge Company*, (2 *Peters*, 245,) an act of a state legislature affecting commerce was held valid. In this case the Chief Justice observes, "if Con-"gress had passed any act which bore upon the case, any act "*in execution of the power* to regulate commerce, the object "of which was to control state legislation over those small na-"vigable creeks into which the tide flows," &c., "we should "feel much difficulty in saying that a state law coming in con-"flict with such act would be valid. But Congress had passed "no such act." Congress has power to establish uniform bankrupt laws; and yet, in *Sturges* v. *Crowninshield*, (4 *Wheat.* 122, 192,) it was held that a state had authority to pass a bankrupt law, provided such law did not impair the obligation of contracts, and provided there was no act of Congress in force to establish a uniform system of bankruptcy conflicting with such law. Congress has power to provide for the punishment of counterfeiting the current coin of the United States; but, in *Fox* v. *The State of Ohio*, (5 *Howard*, 410,) it was held that this provision did not prevent a state from passing a law to punish the offense of circulating counterfeit coin. Why, then, has not this state the power, in the absence of all Congressional legislation, to pass a law which has no greater influence in *regulating* the public lands within the state, than the statute under consideration?

There can scarcely be a doubt that a state law imposing a tax upon the personal property of miners, such as their tools, machinery, provisions, and the gold extracted from the earth, would not amount to an usurpation, on the part of the state, of the constitutional power of Congress to make rules and regulations respecting the public lands; and it is difficult to see how

such a law would be less exposed to constitutional objections than a statute imposing a poll-tax.

The persons upon whom the statute of this state was intended to operate, do not come within the description of persons who were held to be exempt from state taxation in *Norris* v. *The City of Boston*, and *Smith* v. *Turner*, (7 *Howard*, p. 283.) They are not on shipboard in our harbors, nor transiently passing through our territory. They are confessedly within the territorial jurisdiction of the state, and residents, or, at least, sojourners upon our soil; and being such, can claim no exemption under the principle of those cases.

If, then, this statute is to be regarded as a tax-law, we are of the opinion that it conflicts with no clause in the constitution of the United States. Persons, whether citizens or foreigners, occupying mineral lands within the state, though such lands form a poi tion of the public domain, are, in respect to taxation, whether for the support of the state government, or for police or municipal purposes, subject to the legislative jurisdiction of the state. The power existing as to all, there is no prohibition in the constitution of the United States against exercising it over a part only, save that section which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. But that section does not affect the present case, as the act demands nothing from any citizen of the United States.

It being established, then, that the state may impose a tax upon the persons of foreigners alone, we think that the power may be exercised in the manner prescribed by this statute. In other words, if a tax-law be constitutional, a license law must be equally so.

We have thus far directed our attention to the constitutionality of the statute, as tested by the specific grants and prohibitions of power contained in the constitution of the United States, and have spoken of the law as one imposing a direct poll-tax upon foreigners. But we are of the opinion, that it should rather be viewed in the light of an act prescribing certain conditions, upon compliance with which, foreigners are to be per-

mitted to reside in a given locality, and pursue a particular branch of business. It is, in truth, what it purports to be, a license law. It was decided in *Holmes* v. *Jennison*, (14 *Pet.* 540,) in *Grove* v. *Slaughter*, (15 *Pet.* 449,) and in *Prigg* v. *The Commonwealth of Pennsylvania*, (16 *Pet.* 625,) that the people of the several states of the Union had reserved to themselves the power of expelling from their borders any person, or class of persons, whom they might deem dangerous to their peace, or likely to produce a physical or moral evil; and although the position assumed in those cases, that a law of Congress authorizing the introduction of any person or description of persons against the consent of the state, would be an usurpation of power, seems to have been overruled in *Norris* v. *The City of Boston*, and *Smith* v. *Turner*, yet these latter cases do not, as has already been observed, affect the act of the legislature now under consideration. The ground taken by Mr. Justice Woodbury in the cases last cited is, that every sovereign state possesses the power to prescribe the conditions on which aliens may enjoy a residence within, and the protection of, the state. This position is based upon the practice of nations, and of the respective states as well before as since the formation of the constitution, upon the authority of writers on international law, and the decisions of the supreme court of the United States, and is supported by a force and cogency of reasoning, which render it impregnable. And although he was in the minority in the decision of the court upon the peculiar facts of those cases, that circumstance, in no wise, impairs the force of his argument when applied to the statute, the validity of which is contested in this case. If, therefore, a state may prescribe the conditions upon which aliens may enjoy a residence within it, it may also declare the terms upon which they shall be permitted to make their residence in any given portion of its territory, and exercise a particular employment. This is the very thing which the law in question purports to do. It requires foreigners to pay a fee for permission to enjoy the protection of the state government in the mineral region, and in the pursuit of the lucrative business of mining. Viewed in this light, it may be regarded

as a police regulation, and therefore valid within the principles laid down in *Milne* v. *New York*, (11 *Peters*, 132,) and fortified by the views of the court in the *License cases*, (5 *Howard*, 504,) and in the *New York and Boston Passenger cases*, (7 *Howard*, 283.)

Nor do we see any great force in the objection, that the law is a license to foreigners to trespass on the public lands. We do not regard it as such. The state takes the case precisely as it finds it. It sees numerous foreigners actually engaged in mining. It looks to the fact that the general government permits them to trespass on the public lands without complaint, or any effort to prevent them from so doing, and it requires from them the payment of a fee, while so engaged, and until Congress shall assume some control over the matter itself. Instead of the law being a license to foreigners to trespass on the public lands, it is rather a restriction on the commission of such trespasses. Besides, the state is not the steward, nor bailiff, of the general government, having in charge the protection or security of the public property.

But it is contended that the act of the legislature is in violation of treaties of the United States with foreign powers. A sufficient answer to this general objection is, that the complaint does not set forth the nationality of any person upon whom the respondent is alleged to have exercised the functions of his office. It charges that he "has exacted the sum of twenty dol-"lars each from sundry foreigners in the county of San Francis-"co for licenses to mine"—without particularizing whether such foreigners were citizens of a nation with which the United States have any treaty relations. It does not state whether they were Mexicans, Chilenos, Englishmen, Frenchmen, Sandwich Islanders, or Chinese; and the court cannot, upon this demurrer, determine whether any treaty has been violated by the respondent. This difficulty alone would, upon this branch of the plaintiff's argument, be a serious objection to his case: but inasmuch as it may be more satisfactory to have the whole matter, so far as this court is concerned, disposed of in all points upon the merits, rather than upon inadvertencies which might be supplied or corrected in a subsequent litigation, we shall proceed

to examine this position of the plaintiff's counsel. He insists that the act is invalid, because it is opposed generally to treaties of the United States with foreign powers, and particularly to the treaty of Querétaro.

First, as to treaties generally. Perhaps the most satisfactory mode of testing the validity of the law, under this point, will be to take the treaty with that power to whose subjects as extensive privileges are granted by our country as to those of any other nation. We will, therefore, consider the case as if it involved our treaty relations with Great Britain, and under the supposition that a subject of the Queen of Great Britain was the person from whom the sum of twenty dollars had been exacted. By the 14th article of the treaty of 1794, (known as Jay's treaty,) which was substantially renewed by article 1, of the treaty of 1815, the subjects of the King of Great Britain, coming from his majesty's territories in Europe, had granted to them liberty freely and securely, and without hindrance or molestation, to come with their ships and cargoes, to the lands, countries, cities, ports, places and rivers within our territories, and enter the same, to resort there, to remain and reside there, without limitation of time; and reciprocal liberty was granted to the people of the United States in his majesty's European territories; *but subject always, as respects this article, to the laws and statutes of the two countries respectively.* By this treaty, our inhabitants, whilst in the British dominions were to abide by the laws of Great Britain; and the subjects and inhabitants of that country, when in our territories, were to abide by the laws of the United States and by the laws of the respective states where they might be. The only question, then, under this treaty, is, whether the act of the legislature falls within the scope of the powers of a sovereign nation, and, at the same time, is not included in the category of powers granted by the states to the general government; for, if it falls within the former, and is excluded from the latter, then it is one of the laws which the treaty itself makes obligatory upon British subjects. But we have seen that the power of taxation, and the power of prescribing the conditions upon which aliens shall be

permitted to reside in a state, are attributes of a sovereign nation, which have not, except in certain specified cases, of which the present is not one, been given up to the federal government. Our statute, then, is one of the laws or statutes, to which the treaty, by its own terms, provides that the subjects of Great Britain shall be subject. Chief Justice Taney, in speaking of this treaty in *Norris* v. *The City of Boston*, and *Smith* v. *Turner*, (7 *Howard*, 472,) uses the following language: "The "permission there mutually given to reside and hire houses and "warehouses and to trade and traffic, is in express terms made "subject to the laws of the two countries respectively. Now "the privileges here given within the several states are all regu-"lated by *state laws*, and the reference to the laws of this coun-"try necessarily applies to *them*, and subjects the foreigner to "their decision and control." The act, then, is not repugnant to that treaty.

But even if the provisions of the statute did clash with the stipulations of that, or of any other treaty, the conclusion is not deducible that the treaty must, therefore, stand, and the state law give way. The question in such case would not be solely what is provided for by the treaty, but whether the state retained the power to enact the contested law, or had given up that power to the general government. If the state retains the power, then the president and senate cannot take it away by a treaty. A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty making department, and in relation to those subjects the jurisdiction over which has been exclusively entrusted to Congress. When it transcends these limits, like an act of Congress which transcends the constitutional authority of that body, it cannot supersede a state law which enforces or exercises any power of the state not granted away by the constitution. To hold any other doctrine than this, would, if carried out into its ultimate and possible consequences, sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective states, or which should even undertake to cede away a part or the whole of the acknowledged

territory of one of the states to a foreign nation. In the License cases, (5 *Howard*, 613,) Mr. Justice Daniels, speaking of the provision of the constitution in relation to treaties, holds the following language: "This provision of the constitution, it is "to be feared, is sometimes expounded without those qualifica-"tions which the character of the parties to this instrument, "and its adaptation to the purposes for which it was created, ne-"cessarily imply. Every power delegated to the federal govern-"ment must be expounded in coincidence with a perfect right in "the states to all that they have not delegated; in coincidence, "too, with the possession of every power and right necessary "for their existence and preservation; for it is impossible to be-"lieve, that these ever were, either in intention or in fact, ceded "to the general government. Laws of the United States, in "order to be binding, must be within the legitimate powers "vested by the constitution. Treaties, in order to be valid, "must be made within the scope of the same power, for there "can be no *authority of the United States*, save what is derived "mediately or immediately, and regularly, and legitimately "from the constitution. A treaty, no more than an ordinary "statute, can arbitrarily cede away one right of a state, or of "any citizen of a state." It is not within the scope of a constitutional treaty to interfere with the reserved powers of taxation and of control over foreigners, which we have above discussed. No treaty, within our knowledge, has attempted to do it; and if such attempt should be made, the stipulation would, we apprehend, be neither recognized nor enforced by the supreme tribunal of the nation. "If," says Chief Justice Taney, (7 *Howard*, 466,) "the United States have the power, "then any legislation by the state in conflict with a treaty "or act of congress would be void. And if the states "possess it, then any act on the subject by the general govern-"ment, in conflict with the state law, would also be void, and "this court bound to disregard it."

And here let us remark that the questions which we have been examining are questions of *power*, and not questions of justice, or policy, or expediency. We hold that the *power* of

taxation over foreigners, as well as of determining the conditions on which they shall be permitted to enjoy the protection of the state in a particular place or occupation, is, in the language of the supreme court of the United States, "perfect and undimin-"ished and indispensable," and that it cannot be taken away or impaired by acts of Congress or treaties with foreign nations; and that the justice and expediency of tax and license laws must, so far as foreigners are concerned whilst residing within our territorial limits, be left to the discretion of the states respectively, to be exercised as the wisdom of their legislatures shall dictate, subject only to such restrictions as may be imposed by the organic laws of the several states.

But it is especially objected to this statute, that it is in conflict with the treaty between the United States and Mexico, known as the treaty of Querétaro. The eighth article of that treaty is in the following words:

"*Mexicans now established* in territories previously belong-"ing to Mexico, and which remain for the future within the limits "of the United States, as defined by the present treaty, shall "be free to continue where they now reside, or to remove at "any time to the Mexican republic, retaining the property "which they possess in the said territories or disposing thereof, "and removing the proceeds wherever they please, without "their being subjected, on this account, to any contribution, "tax, or charge whatever.

"Those who shall prefer to remain in the said territories, "may either retain the title and rights of Mexican citizens or "acquire those of citizens of the United States. But they "shall be under the obligation to make their election within one "year from the date of the exchange of ratifications of this "treaty; and those who shall remain in the said territories "after the expiration of that year, without having declared "their intention to retain the character of Mexicans, shall be "considered to have elected to become citizens of the United "States.

"In the said territories, property of every kind, now belong-"ing to Mexicans not established there, shall be inviolably

"respected. The present owners, the heirs of them, and all "Mexicans who may hereafter acquire said property by con-"tract, shall enjoy with respect to it, guaranties equally ample "as if the same belonged to citizens of the United States."

The ninth article is as follows: "The Mexicans who, in the "territories aforesaid, shall not preserve the character of citi-"zens of the Mexican republic, conformably with what is sti-"pulated in the preceding article, shall be incorporated into "the Union of the United States, and be admitted at the pro-"per time (to be judged of by the Congress of the United "States) to the enjoyment of all the rights of citizens of the "United States, according to the principles of the consti-"tution; and in the meantime shall be maintained and pro-"tected in the free enjoyment of their liberty and property, "and secured in the free exercise of their religion without "restriction."

Now, the palpable objection to the argument of the appellant's counsel, founded upon any contrariety between the statute and this treaty is, that it does not appear that the act has ever been enforced against any person entitled to the benefit of this treaty, or even against any citizen of Mexico. But we waive this, and treat the matter as if the complaint alleged the Mexican nationality of the parties who claim to have been aggrieved.

The eighth and ninth articles of the treaty above cited distinguish between two classes of Mexicans: 1st, those, who, at the time of the adoption of the treaty, were "established" in the territories ceded to the United States; and 2d, such as were "not established there," but owned property within their limits. For the first class, provision is made in the first two clauses of the eighth article and in the ninth article; and the rights of the second class are defined in the last clause of the eighth article. It is not pretended that the statute conflicts, in any respect, with this last clause, and we may, therefore, dismiss the description of persons therein mentioned from further consideration.

The question then recurs upon the construction of the ninth

article and the first two clauses of the eighth; and it will be noticed that the Mexicans described therein as "established" in the ceded territories are of two descriptions; 1st, those, who should be free to remove at any time to the Mexican republic; and 2d, such as should choose to remain where they then resided. And here again there is no pretense that the rights of those Mexicans, who have chosen to remove, have in any way been infringed. It is then only the second description of persons last mentioned, in relation to whom there can be any conflict between the statute and the treaty. It must still further be observed, that even this class is again distinguished in the treaty into, 1st; those who should retain the title and rights of Mexican citizens; and 2d, those who should acquire the title and rights of citizens of the United States. But here again the appellant did not, and could not, claim that the privileges of the last mentioned first class, secured by the treaty, had been in any way prejudiced.

Having thus eliminated the case of all these descriptions of persons provided for by the treaty, but whose treaty rights neither are, nor were claimed to be affected by the statute, we are brought, finally, to the consideration of the real objection urged by the appellant.

This objection is founded solely upon the ninth article of the treaty. It will be observed that this article speaks of such Mexicans only as should not preserve the character of Mexican citizens; that is, of such as, conformably with the stipulations of the second clause of the eighth article, should prefer to acquire the title and rights of American citizens. Who are they? The same clause last referred to, declares that all Mexicans, remaining in the said territories, should make their election, within one year from the date of the exchange of ratifications of the treaty, whether they would retain the character of Mexican citizens, or acquire that of citizens of the United States; and that all those who remained in such territories, after the expiration of that year, *without having declared their intention to remain Mexican citizens*, should be *considered as having elected to become citizens of the United States.* The

exchange of ratifications of the treaty took place at Querétaro on the 30th day of May, 1848; and, consequently, all "established" Mexicans who had not, on or before the 30th day of May, 1849, declared their intention still to continue Mexican citizens, have elected to become American citizens. Those who have declared such intention, if there be any, still remain aliens and foreigners, and as such are subject to the same restrictions by state authority as the subjects or citizens of any other foreign country. Those who have not declared such intention, are entitled to the privileges stipulated by the ninth article. But this class is specially excepted from the operation of the law in question by the first section of the act itself. Although the language of this section is not so closely in unison with the peculiar phraseology of the treaty as it might be, yet no one can doubt that, under a fair interpretation of it, all that class of persons designated in the ninth article of the treaty, were intended by the legislature to be, and in reality are, excepted from the operation of the act. This being so, the objection that the statute conflicts with this article of the treaty must fail.

We have thus far considered the act of the legislature, in reference to the constitution of the United States, and treaties with foreign powers generally, and the treaty of Querétaro in particular. We now proceed to test it by the constitution of our own state.

The appellant contends that the act is void under the seventeenth section of the first article of the constitution, which is as follows: "Foreigners who are, or who may hereafter become, "*bona fide* residents of this state, shall enjoy the same rights in "respect to the possession, enjoyment, and inheritance of property, as native born citizens." Here again the ground upon which an argument against the statute could be based appears to be wanting. The complaint does not charge that the foreigners, from whom the respondent has exacted the license fees, had become or were *bona fide residents of this state;* and, although foreigners, unless they were *such* residents, neither they, nor the attorney general on their behalf, can avail themselves of this clause of the constitution. Again, it is not alleged that

they had any property, in the possession, enjoyment, or inheritance of which they were molested. On the contrary, the burden of the appellant's argument is, that they have been prevented, by this act, from availing themselves of the wealth of the public mineral lands of the United States. It is difficult to perceive how they could have any *property* in these lands to enjoy, possess, or inherit; and unless they had, this section of the state constitution could not apply.

There is more plausibility in the objection, which is founded upon the thirteenth section of the eleventh article of the state constitution, which is in the following words: "Taxation shall "be equal and uniform throughout the state. All property in "this state shall be taxed in proportion to its value, to be ascer-"tained as directed by law; but assessors and collectors of "town, county, and state taxes, shall be elected by the qualified "electors of the district, county, or town, in which the property "taxed for state, county, or town purposes is situated."

Now, it will be noticed that, although the first clause of this section speaks of taxation in a general and unlimited sense, yet the subsequent clause refers only to direct taxation upon *property*. It requires all *property* to be taxed in proportion to its value. It says that assessors and collectors shall be elected by the electors of the district, &c. in which the *property* taxed is situated. We are of the opinion, that the first clause, when taken in connection with the latter, should be construed as limited to direct taxation upon *property*. And we are further inclined to the opinion that, in addition to this qualification, the section under review must be subjected to still greater restrictions and limitations. Our constitution was framed by intelligent and practical men, who were well acquainted with the organization and operation of the system of state government in all portions of the Union; and when they declared, that taxation shall be equal and uniform throughout the state, they must have referred to such general taxation, as in the other states is commonly imposed alike upon all property for the purpose of defraying the expenses of the government of the state, or of some local municipal corporation. They could not possibly have in-

tended, that the entire aggregate amount of taxation upon persons or the value of property in every town and city of the state, should be equal to, and uniform with, the amount in every other town and city—that property in the city of San Francisco or in the city of Sacramento, for instance, should, in the aggregate, be burdened for state, county, town, and city purposes, with no greater assessments than the secluded *ranchos* in the country. If they did, they have given to us a perfectly impracticable instrument. But it is unnecessary now to decide, how far this clause may be properly extended; and it is alluded to here, only for the purpose of showing, that it could not have been intended by the convention that the constitution should cover so broad a ground as was claimed for it on the argument.

The statute in question, however, does not provide for what is commonly understood by the term tax, as is meant in the constitution by the term taxation. The word tax, in its common acceptation, denotes some compulsory exaction, which a government makes upon persons or property within its jurisdiction, for the supply of the public necessities. It is ordinarily assessed beforehand at stated periods, and collected at appointed times. Its payment is enforced, sometimes, by imprisonment of the person; at others, by the sale of property. The law in question, however, partakes of none of these qualities. It does not require the exaction, at all events, of any thing. The foreigner may pay, or need not pay, the specified amount, depending upon his own option whether he will, or will not, engage in mining operations. The amount is not assessed at all; it is not required to be paid at a definite time; and its non-payment is enforced neither by imprisonment nor sale of property. It is demanded only as often as a party of his own accord, chooses to perform certain acts. It is in the nature of a fee of a specific sum, exacted for licenses to sell certain goods or liquors, or to exercise certain trades, or to exhibit some curiosity, or for admission to certain privileges, or as a toll for the enjoyment of certain facilities, none of which is regarded in the light of a tax in the common acceptation of the term. It is a license fee, and not a tax; and unless the statute be constitu-

tional, we see not how any license law can be constitutional. But does any one doubt that the state may, for general purposes, exact license fees in the above and similar cases, or may empower counties, cities, and towns to demand them in order to defray their local expenses. We cannot believe, that it was the intention of the framers of the constitution not to grant such power to the state government.

It may be said that, under this construction, the legislature might abuse the power with which it is clothed by the constitution, to depress some departments of business and elevate others. But the same objection may be made to all other attributes of the legislative body. Power is always liable to be abused, to whatsoever individual or body of men it may be entrusted. The sure guaranty against the abuse of this power, as of all other powers, exists in the fact that an unjust, partial or impolitic law can, under our system of government, be but of short duration, after it shall have begun to re-act upon the people and lessen or destroy the business of the community.

Judgment affirmed.

SUÑOL *et al.* *vs.* HEPBURN *et al.* (*a*)

(*a*) The case of *Suñol* v. *Hepburn* and the next succeeding case of *Woodworth* v. *Fulton* were argued twice; a re-argument having been ordered by the court for the reasons mentioned in the subjoined opinion of

BENNETT, J. In these cases a re-argument is ordered. Opinions have been prepared in both cases, but the court thinks that the questions involved in them are of so great importance, that it is advisable to have them re-argued. In both cases the question of *possession* is involved. What constitutes *actual possession* under the Mexican, and what, under the common law? One member of the court is of the opinion that there was no *actual* possession in either case, which can enable the plaintiffs to maintain their action.

In the case of *Suñol* v. *Hepburn*, the validity of a transfer of land by an Indian is another important question—and in that of *Woodworth* v. *Fulton*, the validity of all grants of lots in San Francisco by Alcaldes and the Ayuntamiento—and in both cases, one member of the court is of the opinion, that a transfer by an Indian, and grants by Alcaldes, and by the Ayuntamiento of San Francisco, are insufficient to give even a colorable claim of title.

One who is in the actual possession of land cannot, by process of law, be dispossessed by another who has neither title, nor color of title.

A possessory action cannot be maintained under Mexican law by a person who has acquired his title subsequent to the intrusion complained of.

The possession of a party, who has neither title nor color of title, does not extend beyond the metes and bounds of his actual occupation; and this is so according to Spanish and Mexican, as well as English and American law.

The fact that cattle and horses of a person have roamed over, and grazed upon, a particular tract of land, does not, of itself alone, make out an actual possession of the land in him.

The actual possession of a small portion of a large tract of land, with a claim of title to the whole, will not enable a party to maintain a possessory action under Mexican law, where it appears on the face of the papers, by virtue of which he claims, that his title is a nullity.

A deed of conveyance from an Indian to a white person is a nullity on its face, and no one can derive title under it. Such a conveyance is contrary to the policy of Spanish and Mexican, as well as American law, and is strictly forbidden.

Where a deed of conveyance is void upon its face, as being in violation of law, the party claiming under it is chargeable with knowledge of the law, and of the invalidity of the deed; and this is the rule in Mexican as well as in American law. In such case the party does not even derive a color of title, which will give him constructive possession of a tract of land beyond his actual occupation.

The policy of Spanish and Mexican law, prohibiting sales of land by Indians, considered. *Per* BENNETT, J.

The Plan of Iguala, and the Mexican constitutions of 1836 and of 1843, and the decrees of 1812 and 1813, did not remove the restrictions on alienations of land by Indians.

The sovereign power may, in disposing of the national domain, annex such conditions to a grant as it sees fit; and in such case, a restriction against alienation inserted in a grant and authorized by law, will not be held void on the ground that it is against the policy of law.

Under Mexican law, the approbation and consent of the government was necessary to make a conveyance of land by an Indian to a white person, valid; and such consent being wanting, *held*, that a conveyance was void upon its face, and transferred no title, and that the party claiming under it was chargeable with knowledge of its invalidity.

It seems, that by the civil law, a party cannot maintain a *possessory* action, when he has no title, unless he has been evicted by force, fraud, violence, or artifice: but if he has been thus evicted, he will be entitled to be restored to possession, without inquiring whether he has title. *Per* BENNETT, J.

A party cannot, by the Mexican law, *acquire* possession beyond the metes and bounds of his actual occupancy, unless he claims to hold under what is termed a *just title;* (*titulo justo;*) and a deed, void on its face, is not a *just title*.

It is essential to the validity of a deed, that there should be a legal capacity in the grantor to convey, and in the grantee to receive; and if either be wanting, the instrument is invalid.

APPEAL from the court of First Instance of the district of San José. The action was brought by Antonio Suñol, Pedro Sansevaine and Henry M. Naglee against James Hepburn, William Stewart and Charles Stewart, to recover possession of a lot of land, situated in the valley of San José. The action was brought and the judgment rendered before the passage of the statute adopting the common law, and was what is designated in the civil law as a possessory action. The complaint alleged that the plaintiffs, and those through whom they claimed, had been for more than three years in peaceable, public and uninterrupted possession of a certain *Rancho*, known as "*De los Coches*," of which the lot in controversy was part. The whole tract, as it appeared, contained upwards of 2000 acres. The defendant Hepburn had entered and taken possession of a small portion of it, and built a house thereon, and taken up his residence there, claiming that the land was part of the public domain of the United States. The plaintiffs, or one of them, had been in possession of small portions of the large tract for some time previous to the entry of the defendants, but it did not appear that either of them had ever had the actual possession of the particular parcel of land in controversy. At the time of the entry of the defendants the lot was unfenced, and uncultivated, and presented no external signs or indications of being owned or claimed by any one. It appeared, in truth, to be unoccupied wild land.

The plaintiffs, for the purpose of showing their possession of the lot, gave in evidence at the trial their title; they being unable to make out possession on their part except through the medium of their title. This was derived from a grant made by Governor Micheltoreno to an *emancipated* Indian by the name of Roberto. The grant was in the usual form of grants by the government of public lands, excepting that it contained a clause prohibiting Roberto from selling, aliening, mortgaging, pledging, or incumbering or disposing of the land in any manner whatever. The clause was in the following words:—"*No podra venderle, enagenarle, hipotecarle, ni imponer censo, vinculo, fianza, hipoteca, ni otro gravamen alguno.*" Roberto after-

wards became indebted to Suñol in the sum of $500, and conveyed to him the Rancho by a deed dated January 1st, 1847, in payment of the debt, and Suñol conveyed an undivided portion to the other plaintiffs by a deed bearing date the 15th day of December, 1849. The entry of Hepburn on the lot in question appears to have been made before the date of the last mentioned deed. There was no evidence showing any cause of action whatever against the co-defendants of Hepburn. The cause was tried before a jury who were unable to agree, and a verdict was taken in favor of the defendants by stipulation, to be of the same force and effect as if it had been rendered by the jury. Judgment was accordingly entered against the plaintiffs, from which they appeal.

J. M. Jones and *A. C. Crittenden*, for plaintiffs.

R. A. Lockwood, for defendants.

By the Court, Bennett, J. On the first argument of this cause my impressions were strong, that the plaintiffs ought not to recover, and, if it had been an ordinary case, I should have had no hesitation in so deciding at once. I was not entirely satisfied, however, but that, on a re-argument, additional authorities might be adduced, which would leave the case without doubt in the minds both of myself and my associates. I felt, also, in common with the chief justice, that there was a possibility that I might have been led into error. I thought, therefore, that the case was a proper one for re-argument, and that the attention of counsel should be called to the particular points concerning which some doubts were entertained by the court. I was the more inclined to this course, inasmuch as the cause was not argued before a full bench, and from the conviction that a decision, which must not only settle the rights of the immediate parties to this suit, but which may determine great and important interests in all parts of the state, should receive the deliberation, and, if possible, the sanction of all the members of the court. The re-argument was, accordingly, ordered, and

has taken place; and the impressions which I entertained after the first hearing, have been ripened into conviction. Nothing, therefore, remains but to announce the opinion which I then had prepared.

The cause was tried in the court of First Instance of San José, before a jury. The jury were unable to agree; and the parties stipulated that a verdict should be entered in favor of the defendants, saving to the plaintiffs the same rights which they would have had, in case the jury had actually rendered a verdict for the defendants. In strictness, this stipulation should be regarded in precisely the same light as a verdict, and should, in this court, be followed by the same legal results. I shall, in the first place, examine the case as I should be disposed to treat it, had it been tried and the stipulation entered into under the system of practice which exists at present, and, then, consider whether there are any circumstances which should be allowed to control what would otherwise be the legal effect of the stipulation.

The claim of the plaintiffs for the destruction of certain huts mentioned in the complaint, may be dismissed from consideration. The stipulation above mentioned, standing in the place of a verdict, and finding as it does, one cent damage in favor of the defendants, puts an end to that matter.

The defendants Charles Stewart and William H. Stewart are, also, easily disposed of. If it is intended to charge them with taking possession of one or more parcels of land distinct from the lot on which Hepburn entered, the claim against them should not have been included in the suit against him. If they are sought to be made joint possessors with Hepburn, the complaint is unsustained by proof. In either event, the judgment of the court of First Instance is correct, and should be affirmed with costs.

The important point, presented by the papers and argued at the bar, affects the defendant Hepburn alone. Before proceeding, however, to examine the claim of the plaintiffs against him, it is to be observed, in the outset, that no question can be made, whether the acts of Hepburn are sufficient to constitute posses-

sion on his part or not; for, the suit is based solely upon the hypothesis that the affirmative is true. If he was not in possession, then, surely, there could be no cause of action against him, and the judgment in his favor would be correct. The plaintiffs cannot gainsay his possession without destroying their own case.

This is a possessory action. It is based solely upon the ground that the plaintiffs were in possession of the land on which Hepburn entered at the time of his entry, and not upon the ground that they held the property or dominion therein by a valid title. This is the proper construction to be given to the complaint, and this is the view taken by the counsel of both parties in their arguments and briefs.

As, in American law, a party, to maintain his ejectment, may rely on the strength of his title, or simply on prior actual possession, which, if his title does not appear to be defective, may enable him to sustain his action, so, under the Mexican system, a party may have his possessory action, in which the possession of the plaintiff and the disturbance thereof by the defendant may be the sole questions at issue between the parties, or he may have his petitory suit founded on the claim of an indisputable title. Under the latter system, possessory suits are either plenary, being such as are prosecuted and defended in the manner and with the formalities of ordinary judicial proceedings; or summary, also termed interdicts, which are conducted without the solemnities of ordinary suits, are terminated within a short period, and either admit of no appeal, or only of an appeal without suspension of the execution of the judgment. (4 *Feb. Mej.* 271, *sec.* 1, *Ed.* 1834; *Escriche Dic. de Leg. Art.* "*Juicio Posesorio.*") Whether this suit belongs, technically, to one class or the other of civil law proceedings, whether it is to be deemed a possessory action under the Mexican law, or an action of ejectment as understood in the United States, and there seems to be a mixture of the forms of both species in the proceedings, can be a matter of but little moment. The result is the same. In any event the question to be determined is one of possession.

To enable the plaintiffs to maintain the action they must establish two facts: 1st, that they were in actual possession at the time of the intrusion complained of; and 2d, that they are entitled to be reinstated in the possession from which they claim to have been illegally evicted. It results from this, that, if they were not in possession at the time of the defendant's entry, they have never been in a position which could enable them to maintain this suit. How, then, stands the case in this view?

The action on the part of the plaintiffs is joint, and all must recover, or neither can. It must, consequently, appear that, at the time of Hepburn's entry, Suñol, Sansevaine and Naglee were jointly possessed of the lot in controversy. The deed from Suñol to Sansevaine and Naglee was executed on the fifteenth day of December, 1849, and thus, up to that time, the two latter had neither possession, nor right of possession, nor claim of title. If, previous to that date, either of the plaintiffs was in possession, it was Suñol alone. The conveyance to Sansevaine and Naglee cannot carry back their possession, either severally, or jointly with Suñol, beyond the period when they derived their title under it, and any entry on the land prior to the fifteenth day of December could not have been an intrusion on the possession of Sansevaine and Naglee.

It thus becomes material to determine the precise date of Hepburn's entry. The complaint charges it to have been on or about the twentieth day of November, 1849. The testimony, though not entirely clear on the point, one witness stating that as late as the fourteenth day of December, Hepburn had no *house* on the land, nevertheless pretty fully establishes the fact, that the defendant had taken possession as early as the day alleged in the complaint. The apparent discrepancy in the testimony is attempted to be explained on the ground, that Hepburn's tent was, at first, pitched on the reserved space of twenty *varas* lying between the *Alameda* and the land claimed by the plaintiffs, and that he did not move within the bounds of the tract in question until after the conveyance to Sansevaine and Naglee. This, if so, does not negative the idea of his having

been in possession of the entire one hundred and sixty acres in addition to the strip of twenty *varas*. He undoubtedly took possession of the whole at the same time. But this was a question for the jury to determine. They, certainly, might legitimately infer from the evidence, that the defendant's entry was made prior to the fifteenth day of December; and, a general verdict having been taken by stipulation in favor of the defendant, we cannot, from the testimony before us, find the very opposite of the conclusion to which we are bound to suppose the jury arrived.

The possession, then, on which the defendant intruded was that of Suñol alone, and not the joint possession of Suñol, Sansevaine and Naglee, and they cannot maintain a joint action solely on the ground of prior possession. If the defendant is guilty of a wrongful detention of the premises after the acquisition of title by Sansevaine and Naglee, a suit for the recovery of them can be sustained only upon proof of *title* establishing the *right* of possession, and, perhaps, also, a demand, or some act equivalent thereto, which shall put Hepburn in the position of a wrong-doer in respect to Sansevaine and Naglee equally with Suñol.

Perhaps I ought to leave the case here, without reviewing the other points made on the argument; but a consideration of the magnitude of the interests depending, immediately and remotely, on the result of this case, induces me to proceed in the investigation upon the assumption that Sansevaine and Naglee had received the conveyance to them before the entry of the defendant. In such event, the possession of either of the plaintiffs would have been the possession of all. The question then is, had they such a possession as will enable them to maintain this action.

The *judicial possession* may be laid entirely out of the case. It amounts to nothing. It is doubtful whether it was taken before Hepburn's entry. It is not proved in the way that a judicial proceeding should be proved; and, if it were, it does not appear to have been conducted with the formalities required by the Mexican law.

It is clear that the plaintiffs never had the actual *pedis possessio* of the one hundred and sixty acres in controversy. The cattle and horses of Suñol, it is true, roamed over, and grazed upon, portions of the large tract; but this is altogether too slight a circumstance, on which to found a claim to wild, uncultivated, and unfenced lands, unless it be also shown, at the same time, that such cattle and horses were restricted by keepers or otherwise within definite boundaries. If a claim to this lot could be thus sustained, we see no reason why it might not be extended to the greater portion, if not the whole, of the valley of San José.

Indeed, the case of the plaintiffs is not rested on the ground of *actual* possession of this identical lot, or of any part of it. It is sought to be supported by the fact, that some small portions of the whole tract of two thousand acres and upwards, had, at different times, been cultivated by the plaintiff Suñol, and by the Indian Roberto, under whom he claims; that one, or both of them, had a *corral* upon it, and some buildings; and that these circumstances, and others of a similar character, give them, in contemplation of law, the possession of the whole tract described in the grant from the Mexican governor to Roberto. The question, then, is, whether an actual occupation of an inconsiderable portion of a large tract of land is such a possession of the unoccupied portions of the same tract, as will support a *possessory* action under Mexican law; and, if so, in what way is the possession of the unoccupied portions to be established.

In Mexican law, possession is the occupation of a corporeal thing. It is divided into possession in fact, (*de hecho*,) and possession in fact and by the will, (*de hecho y de voluntad.*) Possession in fact is nothing more than a simple holding or detention of a thing, which is under our control, without the intention of acquiring the thing for ourselves; such is the possession of a bailee, a tenant, and others, who possess a thing in the name of another, and not in their own. The possession in fact and by the will, is the holding of a thing with the intention of excluding all others from its use, or, as it is expressed in the *Partidas*,

that holding or detention, which a man has of things corporeal, by the aid both of the body and the mind. This latter species of possession is divided into natural and civil. Natural possession is that which consists in the detention of a thing itself corporeally, as one's house or estate; and civil possession consists in the detention of the thing mentally, as when one departs from his house or estate without the intent to abandon it. True possession comprises both natural and civil, and results from some regular title, (*justo titulo*,) that is, a title sufficient to transfer the property. To acquire possession, there is necessary the will or intention to acquire it, and the occupation or actual detention of the thing, either corporeally or symbolically. The above is the general definition of the term possession in Spanish and Mexican law. (*Escriche*, *Dic. de Leg. Art.* "*Posesion;*" 1 *Feb. Mej.* 349, *sec.* 45; *Leyes*, 1, 2, *and* 6 *of tit.* 30, *Part.* 3; *Instituciones de Asso y Manuel*, *lib.* 2, *tit.* 2, *sec.* 5, 6, 7, *page* 185 *of Madrid Ed.* 1785; 1 *White's Comp.* 93, 94; 2 *id.* 84, 85.) Actual possession is that which is accompanied with the real and effectual enjoyment of an estate with the reception of its fruits, and is contradistinguished from imaginary or fictitious possession. (*Escriche*, *Dic. de Leg. Art.* "*Posesion actual.*") Possession of real property is lost, if the possessor is evicted by force; if, when he is not present, another enters on it and prevents his re-entry; and if, seeing that another enters on his property, he submits to it, and does not drive out the intruder; but in neither of these cases does he lose the dominion. (*Instituciones de Asso y Manuel*, as above cited; *Escriche*, *Dic. de Leg. Art.* "*Posesion.*")

The above rules respecting possession in Spanish and Mexican law do not differ materially from those of the French law. It is necessary, says Domat, to distinguish in the general idea which is formed from the word possession, a right and a fact; the right to possess, and the actual detention, which is a fact. (1 *Domat*, *lib.* 3. *tit.* 7.) Possession taken in a proper sense, is the detention of a thing, which he, who is master of it, or who has reason to believe that he is so, has in his own keeping, or in that of another person by whom he possesses. (*Id.* 469,

lib. 3, *tit.* 7, *sec.* 1, *art.* 1.) Again, the same writer says, that possession implies a right and a fact; the right to enjoy annexed to the right of property, and the fact of the real detention of the thing, that it be in the hands of the master, or of another for him. (*Id. lib.* 3, *tit.* 7, *sec.* 1, *art.* 2.) Again, one may possess corporeal things whether they be moveables or immoveables, but, according to the differences of their nature, the marks of the possession of them are different. Thus, one may possess moveables, by keeping them under lock and key, or having them otherwise at one's disposal. Thus, one possesses cattle, either by shutting them up, or giving them to be kept. Thus, one possesses a house by dwelling in it, or trusting it to a tenant, or building in it. Thus, one possesses lands by cultivating them, reaping the fruits, going and coming through them, and disposing thereof at pleasure. But although possession implies the detention of what we possess, yet this detention ought not to be understood, as if it were necessary to have always either in our hands, or in our sight, the things of which we have possession. But after the possession has been once acquired, it is preserved without an actual detention. The honest and fair possessor is he, who is truly master of the thing which he possesses, or *who has just reason to believe that he is so*, although it may happen in effect that he is not so; as it happens to him who buys a thing, which he thinks belongs to the person whom he buys it of, and yet belongs to another. The natural connexion, which is between the possession and the property, makes the law to presume that they are joined in the person of the possessor; and until *it be proved that the possessor is not the right owner*, the law will leave him, *by the bare fact of his possession*, to be considered as such. For, seeing it is the owner who ought to possess, it is natural to presume that he who is in possession is also the right owner, and that the right owner has not suffered himself to be turned out of possession. It follows from this rule that all possessors ought to be maintained in their possession and enjoyment of the thing, until they who trouble them in their possession, prove clearly their right; and if *a demand against a possessor is not grounded upon good and sufficient*

titles, it is enough for the possessor to allege his possession, without producing any other defense. (*Domat, lib.* 3, *tit.* 7, *sec.* 1, *arts.* 4, 6, 11, 13, 15.)

Argou, in his *Institution au Droit Français*, (*lib.* 2, *chap.* 9—*tom.* 1, *p.* 221–8,) in treating of possession, says, that "he "who has the possession of a thing, although he may not be the "true proprietor, has a great advantage over those who are not "in possession. If he is molested in his possession, after "having possessed for a year and a day, he has an action by "which he is maintained in his possession. The possessor is "not obliged to show the title to his possession, and when it is "demanded of him by what title he holds, it is sufficient for "him to say, I possess, because I do possess. Possession, "purely natural, is a simple detention of the thing, without "any intention to possess it in the quality of proprietor. "Civil possession is the detention of the thing, accompanied "with the design of possessing in quality of proprietor. Al- "though this possession cannot be acquired by the sole inten- "tion of him who wishes to possess, without a real and actual "possession, it can be retained by the intention alone of retain- "ing it. Whilst I dwell in my house, if I go forth with the "intention of returning, I retain the civil possession, &c. But "from the moment when a man has been evicted by *force and* "*violence*, he ceases to possess, but has an action, which he "can institute within a year and a day, for being restored to "the possession of which he has been deprived *by force*." Cocceji, in his commentary on Grotius, (*lib.* 2, *cap.* 3, *sec.* 11 —*tom.* 2, *p.* 154,) thus defines possession. Possession, he says, consists in detention, and, therefore, is a bodily act; and in the intention to possess; one of these two failing, possession ceases, and therefore the intention alone is not sufficient.

It is laid down in the Institutes of Justinian, (*lib.* 4, *tit.* 15, *sec.* 5,) that a possession may be *retained* by the mere intention only; for, although a man is neither in possession himself, nor any other for him, but has quitted the possession of certain lands with an intent to return to them again, he shall, nevertheless, be deemed to continue in possession; but that, although posses-

sion may be *retained* by intention only, yet this is not sufficient for the *acquisition* of possession.

But the clearest exposition of the doctrines of the civil law in relation to possession is to be found in the Louisiana code, which, in most, though, I apprehend, not in all particulars, is only declaratory of the principles of the civil law in those countries where it prevails. By that code, possession is defined to be the detention or enjoyment of a thing, which we hold or exercise by ourselves, or by another who keeps or exercises it in our name, (*Art.* 3389;) and, in unison with the authorities above cited, it divides possession into two species, natural and civil. (*Art.* 3390.) Natural possession is that by which a man detains a thing corporeal, as by occupying a house, cultivating grounds, or retaining a moveable in possession. (*Art.* 3391.) Possession is civil, when a person ceases to reside in the house or on the land which he occupied, or to detain the moveable which he possesses, but without intending to abandon the possession. (*Art.* 3392.) Natural possession is also defined to be the corporeal detention of a thing, which we possess as belonging to us, without any title to that possession, or with a title which is void. (*Art.* 3393.) Civil possession, on the contrary, is defined in this sense, as being the detention of a thing by virtue of a *just title, and under the conviction of possessing as owner.* (*Art.* 3394.) Possession implies a *right and a fact;* the right to enjoy annexed to the right of property, and the fact of the real detention of the thing, that is in the hands of the master or of another for him. (*Art.* 3397.) To be able to acquire possession of a property, two distinct things are requisite; 1. The intention of possessing as owner; 2. The corporeal possession of the thing. (*Art.* 3399.) It is not necessary, however, that a person wishing to take possession of an estate, should pass over every part of it; it is sufficient, if he enters on and occupies a part of the land, provided it be with the intention of possessing all that is included within the boundaries. (*Art.* 3400.) When a person has once acquired possession of a thing by the corporeal detention of it, the intention which he has of possessing, suffices to preserve the possession in him,

although he may have ceased to have the thing in actual custody, either himself, or by others. (*Art.* 3405.) The intention of retaining possession is always supposed, where a contrary intention does not appear decidedly; so that, although a person may have abandoned the cultivation of his estate, he shall not, therefore, be presumed to have abandoned the possession, but shall be presumed, on the contrary, to have the intention of retaining it, and shall retain it in fact. (*Art.* 3406.) One of the rights which is common to possessors is, that every person, who has possessed an estate for a year, and is disturbed in it, has an action against the disturber, either to be maintained in his possession, or to be restored to it, in case of eviction. (*Art.* 3417, *Sub.* 2.)

From the authorities above cited it will be seen, that the Mexican law, adopting the principles of the Institutes and Pandects of Justinian in relation to possession, does not differ materially from the laws of France and Louisiana, which have also derived their doctrines on this subject from the same original source. Neither does it differ essentially from the common law rules concerning possession. The natural possession, the actual and real possession, the possession in fact, spoken of in the authorities cited, appear to be but other names for what is termed in the common law, actual possession; and the civil possession, the possession by the mind or intention or will, appear to be but different forms of expression for the constructive possession of the common law—that is, a possession, not actual and corporeal, and readily manifest to all people, but one which is to be made out through a deduction of title and by a process of reasoning. It must, however, be observed, that the lines and colors of the different species of possession, whether in the civil or the common law, so intermingle and blend together, according to the infinite variety of circumstances, that it is quite impossible to frame any general rule or precise definition by which the character of each successive case, as it arises, can be readily and accurately determined. But I think that the possession of the plaintiffs, as claimed by them in this case, partakes rather of the nature of civil than of corporeal possession, under the definitions of Mexican law, and of constructive rather than of

actual possession, as these terms are used and understood in the common law. And, I am further of the opinion, that, unless it shall appear, that the plaintiffs claim to hold under what is termed in the authorities above cited *just title*, a question which will hereafter be considered, they cannot be deemed to have ever *acquired* possession beyond the precise limits of their actual and corporeal occupation.

Having thus seen the general characteristics of the different kinds of possession, let us next direct our attention to the inquiry, as to what is the kind of possession and the nature of the intrusion, which will enable a party to maintain a possessory action.

By the Louisiana Code of Practice, (*Art.* 49,) it is declared that a person, to be entitled to bring a possessory action, should have had the *real and actual* possession of the property, at the instant when the disturbance occurred; a mere *civil or legal* possession is not sufficient.

The Institutes of Justinian, (*lib.* 4, *tit.* 15, *sec.* 4,) treating of proceedings concerning contested possession, declare that, in any cause, either concerning things moveable or immoveable, that party prevails, *who was in possession at the commencement of the suit*, if it be not shown that he gained such possession *by force, by clandestine means, or precariously.* Again, it is said, (*id. ibid. sec.* 6,) that the interdict for the recovery of possession, is generally employed, when any one hath been ousted *by force* from the possession of his house or estate; who then becomes entitled to the interdict *Unde vi*, by which the intruder is compelled to restore him possession, although he, who had been thus forcibly ousted, was himself in possession by clandestine means, by force, or *precariously.*

The possessory action of the Mexican law seems to be subject, in some cases at least, to the same rules. It is brought to recover possession of immoveable property, of which one has been despoiled (*despojado*) by another. The word despoil (*despojar*) involves, in its signification, violence or clandestine means, by which one is deprived of that which he possesses. (*Escriche, Dic. de Leg. Arts.* "*Despojo;*" "*Despojar;*" "*Interdicto de recobrar la posesion;*" 4 *Feb. Mej. p.* 273, 274, *sec.* 8

to 18.) The latter work says, that the interdict for the recovery of lost possession is most favored by the laws; public tranquillity requires this, for the reason that, without such remedy, there would be continual despoliations, (*despojos.*) And, in speaking of a regulation of the *Audiencia* of Mexico respecting proceedings in case of persons deprived of, or disturbed in, the possession of any thing, and providing for the determination of their claims to the property or dominion, it says, that this regulation is to be understood as applicable, where the person complained against is a possessor in good faith, and has not despoiled the other of the thing *clandestinely or by force;* because, if he has deprived him of it *in this manner*, whatever be his title, the one who is despoiled, his heirs and successors, ought, first of all, to be restored to the possession, without citation of the offender, although the latter may wish to prove, or may prove immediately, his ownership; for his claim must be reserved to be established in the appropriate action, which is the petitory. (*p.* 274, *sec.* 8, 9, 14.) Again, in sections ten and eleven, the author says, that the injured party may pursue his remedy by way of action, or by way of exception; and that he is permitted to make use of the latter remedy against the despoiler, or him who has advised the despoliation, or possesses or has received the thing, knowing that it had been *seized by force*, (*quitada por fuerza,*) &c. In section 12, he says, that this, the possessory form of proceeding, belongs to the injured party against any one, who is over twenty-five years of age and is capable of making *clandestine or forcible entry* on land, (*despojó violenta ó clandestinamente,*) &c.; and that, if one *takes by force*, (*quita por fuerza,*) his own property from another, or in which he has any interest, he loses that interest which he may have in it.

In the Louisiana Code it is laid down, that a possessory action may be sustained where the eviction was by "force or otherwise;" but in *Meeker* v. *Williamson*, (4 *Martin*, *Rep.* 626,) decided in 1817 and before the adoption of the code, the court uses the following language: "The plaintiff proving that he "was in possession, and ousted by violence, fraud, or artifice,

"becomes entitled to recover possession at once." In *McDonough* v. *Childress et al.*, (15 *Louisiana Rep.* 556–559,) the counsel for the defendant says, *arguendo*, that the reason for the distinction in the 49th Art. of the code of practice, which gives the possessory action to one species of possession and denies it to the other, is perfectly obvious; it is given, he adds, to redress a *physical* injury and prevent the *violence*, which would otherwise take place; whereas a disturbance of *mere legal* possession does not produce danger of violence, nor require so prompt an action to redress it.

The authors, to whom I have above referred, both in reference to the nature of possession in general, and the different species of it, by virtue of which such an action as the present may be sustained, appear to me to be in conflict, not only, each with the other, but each with himself; and the only way in which I can reconcile their apparent contradictions, is by the following conclusions:—1. That, in case the party can make out his possession by showing an actual occupancy, without resorting to an exhibition of his title, then, although he may have no title whatever, yet, if he can show that he has been evicted by force, fraud, artifice, or any clandestine means, he is entitled to be restored to possession at all events, even though the other party may offer, and may be able to prove an unquestionably valid title in himself; and, 2. That where the plaintiff claims the possession of a large lot or tract of land included within the boundaries of his deed, by virtue of his having entered on and actually occupied a portion, in such case, he cannot recover for an intrusion on any portion not so actually occupied, unless it appears that he claims under a *just title* and in good faith, without which requisites he could never have *acquired* possession beyond the lines of his *actual* occupancy. In such case, the nature of the controversy changes from a question of mere possession, to a question as to the *right* of possessing; and this right can be established only through the medium of a *just title*.

I have referred to the case of *Meeker* v. *Williamson*, (4 *Martin*, *Rep.* 625.) It was held in that case, that, although ti-

tle could not be tried in a possessory action, yet if the plaintiff puts at issue his *right* of possessing, and alleges ownership and exhibits his title, the defendant may dispute it, and retain possession until the plaintiff makes it good. Although the facts of that case differ, in some respects, from those developed in the present one, yet the principle on which the former was decided appears to be equally the principle on which the latter must depend.

It was insisted in *Meeker* v. *Williamson*, that the plaintiffs had a right to be restored to their possession, independently of any inquiry into their title, as in the case before us it is claimed that the validity of the plaintiffs' title cannot be questioned. In the former, the plaintiffs adduced no other evidence of their title than a bill of sale to them, as in the latter, the plaintiffs have adduced no evidence of their possession of this particular lot, prior to the entry of the defendant, other than their title. There, the court say, it is impossible to pronounce on the question of possession, without examining whether the bill of sale be such as the plaintiffs could possess under; so here, I see not how we can determine in respect to the plaintiffs' possession of this particular lot, without ascertaining whether their title be such as could give them the *right* of possessing. In that case the court say: "In mere actions *recuperandæ possessionis*, the fact of " possession alone is at issue. The plaintiff, proving that he was " in possession, and ousted by violence, fraud, or artifice, becomes " entitled to recover possession at once; the other party not being " even permitted to say that the plaintiff has no title to the thing. " But where the plaintiff puts at issue his *right* of possessing, as " where he alleges that he is the owner, and presents his title, as " the evidence of his possession, the *single fact* of possessing is no " longer the *only question*. The defendant is then allowed to dis- " pute the validity of that title, and is maintained in the actual " enjoyment of the premises, if the plaintiff fails to make his " title good." In support of these positions, two Spanish writers of acknowledged eminence and ability are cited; *Greg. Lopez on Part.* 3, 2, 7; and *Gomez in leg. Tauri*, 45 *n.* 118.

Let us apply that doctrine to this case. The action is confess-

edly one *recuperandæ possessionis.* The plaintiffs, not having had the real and actual possession of the premises, could adduce no proof of possession, other than through the medium of their title. Their right of possessing this identical lot was at issue; they have alleged their ownership, and have presented their title as the evidence of their possession; the *simple fact* of possessing is, therefore, in the language of the court in *Meeker* v. *Williamson*, no longer the only question, and the defendant is allowed to dispute the validity of their title, and retain possession, if they fail to show a title under which they could possess.

This appears to be not only law, but reasonable and founded in justice. Were it not to prevail, then it would be necessary to hold, not only that the defendant could not avail himself of the imperfection or nullity of his adversary's title, when necessarily adduced as the only means by which the latter can make out his possession, but also that, according to the authorities hereinbefore cited, he could not be permitted to allege, or set up, or sustain his defense upon a perfect and indisputable title on his own part. This latter contingency, certainly under American, and doubtless under Mexican law also, can occur only where the defendant has evicted the plaintiff from actual possession, through force, fraud, or artifice; in which event, as we have seen, the plaintiff is entitled to be restored to possession irrespective of title; for, in the language of Mexican writers, public tranquillity requires, that no one, of his own authority and with violence, should be allowed to deprive another of that which he possesses. (*Escriche, Dic. de Leg. Art.* "*Despojo.*")

The point, then, which remains to be considered is as to the effect of the plaintiffs' title. And, first, let us ascertain what is understood, in Mexican law, by the terms *just title*, and holding in *good faith.* It was stated by the counsel for the appellants that there could be no possession, which the law would recognize as such, either natural or civil, either in fact or by the will, unless it was taken and held in good faith and by virtue of a *just title.* I think, the counsel carried the doctrine too far. The Spanish law recognizes a possession in bad faith and without

just title. (*Escriche, Dic. de Leg. Art.* "*Poseedor de mala fé.*") However this may be, the necessity of a *just title* is, in the present case, admitted by counsel, as well as supported by authority. A possessor in good faith, is he, who, by a *just title*, such as sale, gift, or legacy, has acquired a thing from one whom he believed to be the owner, or to have the right to sell it; (*Escriche, Dic. de Leg. Art.* "*Poseedor de buena fé; 1 Feb. Tapia*, 232;) and believing, at the same time, that he who sold it had the power or faculty of selling. (*Escriche*, as last cited.) The possessor in bad faith, is he, who has under his control a thing which belongs to another, with the intention of appropriating it to himself, without a title which is translative of dominion, and he who holds a thing by virtue of a regular title, (*titulo legitimo*,) but derived from a person who he knew had not the power to sell it. (*Escriche, Dic. de Leg. Art.* "*Poseedor de mala fé.*") And one of the instances put of a possession in bad faith, is where one has acquired a thing in *contravention of the laws.* (*Escriche*, as last cited.) The amount of this is, that, if the title be regular and fair on its face, and the purchaser had no reason to suppose that the vendor had not the capacity to convey, the possession is under *just title* and in good faith; but, if the title be *defective on its face*, or the purchaser knew that the vendor lacked the capacity to sell, the possession is not in good faith, nor under *just title.* Or, to express the result in common law language, if the title be *colorable*, it may be adduced to show possession of land, beyond the actual occupation, and to the extent of the boundaries mentioned in the deed. If, therefore, in the case at bar, the title of the plaintiffs be regular on its face, and they could, in contemplation of law, have believed that the Indian Roberto had power to sell, then they might, probably, make use of their title to extend their possessions so as to make it co-extensive with the limits laid down in their deed.

The question, then, is, whether their title be of this description. I am convinced that it is not. I am convinced that Roberto had not the power to convey in the manner he did; that the title of the plaintiffs is defective and void on its face; and

that they are chargeable, in law, with knowledge of both of these facts. If I am correct in these positions, there can be no pretence that they claim under *just title*, or can be considered as possessors in good faith.

I shall now proceed to consider these positions. And, first, as to the title. An essential element in the validity of a contract, whether in Mexican or American law, is a capacity to contract—a capacity in the grantor, to convey—and a capacity in the grantee, to receive. In some instances, as in the case of minors, there may be a qualified capacity to contract, which, when exercised, may, by subsequent acts, be brought to attain the effect of a full capacity. But in Roberto there was lacking, in every respect, the capacity to transfer the land, which he held as a gift from the government. The very instrument under which he acquired his rights, the grant from the governor of California, declares, in express terms, that he shall not have the power to alienate or mortgage the land, or impose upon it any charge or incumbrance whatsoever.

It cannot be seriously doubted, that any independent government may, in disposing of the national domain, annex to the estate and right conceded, such conditions and restrictions, as, in its own sovereign pleasure, it sees fit. The rule, that restraints upon alienation are contrary to the policy of the law, and therefore void, may be applicable to a conveyance from one individual to another, but can have no application to a grant from the sovereignty of a nation, or from an officer to whom the exercise of this attribute of sovereign power has been entrusted. Not only was it not opposed to Mexican law, for the governor of California in the discharge of his legitimate duties in distributing the public lands, to impose on an *emancipated* Indian restrictions against alienation, but it was in strict conformity with the positive provisions of Mexican legislation.

Mr. Halleck, in his report to General Riley concerning the regulations which controlled the grants or sales of land in California, says, "The emancipated Indians were to assist in the "cultivation of the common lands of the new *pueblos*, but were "prohibited from selling any of the lots or stock assigned to

"them. All contracts with them were declared void. If they "died without heirs, their property reverted to the nation." And he adds, that the regulations, of which this is one, were confirmed as late as the year 1834. According to the same report, the secularization of the *Missions* of California was first projected by the governor and territorial Deputation of California, for the purpose, and under the pretence, real or ostensible, of ameliorating the condition of the native population.

The object of the restriction in the grant to Roberto, and of the law to which Mr. Halleck refers, is entirely obvious. They both had, for their beneficent purpose, the interposition of an insuperable barrier against all attempts on the part of the white race to strip the natives of the property which they might accumulate by their own industry, or which they might receive from the bounty of the government. Such provisions were no less wise in Mexico, and no less necessary in California, than they have been found, from experience in the United States, to be imperative, in order to prevent ignorance and thoughtlessness from being led into folly by superior knowledge and prudence and sagacity. And this was no new and late tone given by Mexican legislators to national policy. Whatever may have been the practice of the European settlers of the Spanish dominions in America, the spirit of the Spanish laws, when viewed in the light of the ages in which they were enacted, always endeavored, though often with but little success, to cherish and protect the native inhabitants against the rapacity of their invaders.

By a decree of Philip II, made on the 24th day of March 1571, it was ordered, that when Indians wished to sell their property, whether personal or real estate, it was to be sold at auction, in the presence of the justice, after the expiration of thirty days in the case of real estate, and nine days in the case of personal property; and that any sale, which had not these requisites, should be of no validity or effect; (*de ningun valor ni efecto;*) but that the justice might, if it appeared proper to him, abridge this period in respect to moveables. (*Ley* 27, *tit.* 6, *lib.* 1, *de la Rec. de Indias.*)

By *law* 18, *tit.* 12, *lib.* 4 *of the Recopilacion de Indias*, it was ordered, that the sale and distribution of lands to the Indians should be made in such a manner, that there should be appropriated to them a surplus over and above what they might, in strictness, lay claim to; and that the lands, upon which they should, by their personal industry, have made improvements, whereby the fertility of them was increased, should, in the first place, be set apart for them, and that, in no event, should they have the power to sell or alienate them, (*por ningun caso se les pueden vender ni enagenar.*)

Laws 16, 17, 18 *and* 19, *of title* 12, *lib.* 4, of the same code also prohibited the sale of lands of the Indians without the citation of the *fiscal* of the *audiencia*, and provided rules and regulations to protect the Indians in the possession of their lands, and to secure them in the free use and enjoyment of them.

In order to enforce the more exact observance of the laws last cited, and by virtue thereof, the royal *audiencia* of Mexico, on the 23d day of February 1781, adopted an ordinance, entitled *Instructions concerning sales and alienations of lands by Indians*, which sets forth, in full, the policy of the Spanish laws in prohibiting such sales. This speaks of the general abuse with which the Indians persisted in the hurtful practice of alienating their lands, building-lots, and houses, as well those of their own individual acquisition, as those of community, whereby they subjected themselves to inexpressible losses, (*imponderables perjuicios*,) until, at length, the most improvident among them found themselves destitute of habitations wherein to live, and were left without even the shelter of cabins sufficient for the preservation of human life. Reference is therein made to the great prejudice which the Indians suffered, through loans, pledges, leases, and sales, which they were in the habit of making, either voluntarily or under the constraint of want or compulsion, not only from one to another, but also to strangers, Spaniards, Mestizos, and other castes, without regard to the provisions of the laws in the *Recopilacion de Indias*, which declared such sales to be, not only unlawful, but prohibited, unless made with a previous license and with the formali-

ties required by law. It declares that this practice, increasing from day to day, would, if longer tolerated, induce the fear that the Indians would finally arrive at that most unhappy condition, in which they would have neither habitations to dwell in, nor land to cultivate, nor means wherewith to procure a sustenance or pay the duties imposed on them, and would become inaccessible to the pious efforts of the government for their preservation and increase; but would, when finding themselves in a destitute condition, surrender themselves to idleness and a vagabond life, to which they were naturally prone, would abandon their families and separate themselves from their *pueblos*, become fugitives and vagrants, and thereby, to a great degree, deprive the royal treasury of the tribute which they were required to pay. These are some of the many motives and inducements recited in that ordinance for prohibiting Indians from alienating or incumbering their lands. It then declares that, in no case and under no pretext, should there be executed any sales, mortgages, leases, or other species of alienation of lands by Indians, not only of such lands as were set apart for common use, but also of such as had been, or which should be, acquired as private property by inheritance, gift, or other means of acquisition, unless such sale, lease, or other species of alienation, should have first received the license of the superior government, the general court of the natives, or the royal *audiencia*, upon proof of the necessity and utility thereof, with a previous hearing of the *fiscal*, and after a full compliance with all the requirements of law; and all justices and *escribanos* were prohibited from sanctioning any instrument of sale or lease, without the aforesaid licenses, under the penalty of five hundred dollars and loss of office, and the nullity of such instruments, (*la nulidad de los que asi otorgaren*,) with the additional penalty that the vendors, lessors, and mortgagors, and the purchasers, lessees, and mortgagees, should be condemned to lose the lands, which were, thereupon, required to be given to other necessitous persons, who would observe the laws in relation to their preservation and use. (*Ordenanzas de Tierras y Aguas*, 94 *to* 98.)

So, also, by the royal ordinance for the establishment and instruction of the *Intendants of Army and Province* in New Spain, which received the sanction of the Spanish monarch Charles III in the year 1781, it was ordered, that crown lands should be distributed to married Indians, who were not, either in their own right or in the right of their wives, the owners of any, with a prohibition from aliening the same, in order that their heirs of both sexes might succeed thereto; "for," says the ordinance, "my royal pleasure is, that all such natives may have a "competent quantity of real property." (*Sec.* 61, *of Real Ordenanza de Intendentes.*)

These are some of the provisions of Spanish and Mexican law, touching the disability of Indians to transfer their lands. All of them manifest the great anxiety which the rulers of Mexico have felt, to collect the natives together in communities and subject them to municipal regulations, to secure to them the ability to pay the tribute imposed upon them for the supply of the national treasury, to induce them to forget their ancient religious rites and embrace the catholic faith, to reform their idle and roving propensities and make them industrious and useful subjects. (*See Ley* 1, *tit.* 3, *lib.* 6, *Rec. de Indias.*) The legislation on this subject was not limited solely to considerations of benefit to individuals. Its whole tenor abundantly proves, that its main purpose was the advancement of great measures of national policy in respect both to temporal and spiritual affairs—that it was a series of continued efforts to obviate the hurtful consequences resulting to society from having in its midst a population destitute of habitations and the means of subsistence, and consequently vicious, vagrant, and easily seduced into the commission of crime.

It would seem to be sufficient to establish the position, that the conveyance from Roberto to Suñol did not give even a color of title, that the attempted transfer was not only in palpable violation of the plain terms of the grant to Roberto, but was expressly prohibited by positive law, and in contravention of the entire spirit of Spanish and Mexican legislation. I cannot doubt, that the Mexican courts would have held the conveyance

to be void, not only when directly attacked by the government or by the beneficiary himself or his heirs, but when coming up collaterally, as in this case. The law, for wise municipal purposes, has pronounced it to be of no validity or effect, and courts ought not to attempt to overturn the ascertained policy of the legislative power.

But the counsel for the appellants insists, that, by the decrees of 1812 and 1813, (9 *Col. of Decrees* 54, 57, 107,) and by the provisions of the constitution of 1836, (*Arts.* 1, 2, 7,) and of the constitution of 1843, (*tit.* 2, *art.* 7,) the restrictions on alienation by Indians were removed.

The decrees cited provide for the distribution to Indians of lands in the vicinity of the *Pueblos*, and lands held in common, with prohibitions to entail the same or convey them in *mortmain;* and the conclusion is deduced from the fact of such limited prohibition, that the beneficiaries had, in all other respects, the unqualified power of alienation. I cannot come to the same conclusion. I think these decrees neither do, nor were intended to, supersede the laws then in force. The law, as it then stood, did not absolutely forbid the transfer of lands held by Indians; but it required, as an essential requisite to the validity of a conveyance, that it should be made under the supervision, and receive the approbation, of the proper officer. These decrees, however, take away the power of alienation, even in this manner, when the transfer is by way of entail, or in *mortmain*. The anterior law is not expressly repealed by the decrees cited, and, at the same time, not being inconsistent with, nor repugnant to them, is not affected by implication.

The constitutions referred to, it is said, by conferring upon Indians the character of Mexican citizens, thereby removed all restraints on the alienation of lands by them. But this argument proves too much. Infants, idiots, lunatics, spendthrifts, and married women, are also Mexican citizens; yet it can scarcely be claimed that those constitutional provisions were intended to remove all disabilities, under which they are placed by law, and enable them to contract and alienate their property without the intervention of tutor or curator, committee or guar-

dian. So with Indians. Though elevated to the condition of Mexican citizens, they must still contract, and convey property, in the mode prescribed for them by law.

It is further contended that, by virtue of the Plan of Iguala, and the circular of January 11th, 1821, which declared that all the inhabitants of Mexico were equal in rights, without distinction of Europeans, Africans or Indians, the disabilities of the latter class to transfer their lands without control were removed.

The same objection to this argument arises, which has been noticed in respect to that founded on the constitutions referred to. It proves too much. Besides, it is laid down in the *Febrero Mejicano,* (*tom.* 1, p. 97,) in speaking of the Plan of Iguala, that all those laws, which establish different regulations, according to the diversity of races, still remain in force, when they concede some rational and substantial favor, though not, when, without reason, they subject any class to a distinction ridiculous and abhorrent. And we have seen, that the object of the disability under consideration, was not to create an invidious distinction or impose a useless burden, but, in part at least, to favor the native inhabitants by shielding them from the impositions of the superior races.

By the above reasoning I am led to the conclusion that the title of the plaintiffs is null and void.

The next question is whether it was void on its face. The approbation and consent of the government being necessary to the transfer by Roberto, and his conveyance having been made without such approbation or consent, the title, therefore, on its face, is lacking in a substantial point, as much as if, in any other particular, it were defective in the essential requirements of law.

Are the plaintiffs chargeable with knowledge that they took nothing under their deeds? It is a principle of Spanish and Mexican jurisprudence, equally with the English and American, that every citizen is presumed to know the law, and, with some exceptions not affecting this case, ignorance of it excuses no one. (*Escriche, Dic. de Leg. Art.* "*Ignorancia;*" 1 *Feb. Mej.* 13.) The law, then, says that the plaintiffs, when they received

their title, knew that Roberto had not the capacity to convey; that the title to them was void, on its face, for the want of an indispensable requisite. They cannot, therefore, according to the Mexican authorities hereinbefore cited, insist that they claim in good faith.

I come, now, to consider the effect of a claim set up under a title thus defective.

In Spanish law, nullity is divided into absolute and relative. The former is that which arises from a law, whether civil or criminal, the principal motive for which is the public interest; and the latter is that which affects only certain individuals. Nullity is not to be confounded with *rescision*. Nullity takes place, when the act is affected with a radical vice, which prevents it from producing any effect; as where an act is in contravention of the laws or of good morals, or where it has been executed by a person, who cannot be supposed to have any will, as a child under the age of seven years or a madman, (*un niño ó demente.*) *Rescision* is where an act, valid in appearance, nevertheless conceals a defect, which may make it null, if demanded by any of the parties; as for example, mistake, force, fraud, deceit, want of sufficient age, &c. Nullity relates generally to public order, and cannot, therefore, be made good, either by ratification or prescription; so that the tribunals ought, for this reason alone, to decide that the null act can have no effect, without stopping to inquire whether the parties to it have, or have not, received any injury. *Rescision*, on the contrary, may be made good by ratification or by the silence of the parties; and neither of the parties can demand it, unless he can prove that he has received some prejudice or sustained some damage by the act. (*Escriche, Dic. de Leg. Art.* "*Nulidad.*")

In *Spencer* v. *Grimball*, (6 *Martin's New Series*, 362,) the court, treating of the Spanish law on this subject, say: "Some "of the writers on our law, of the very highest authority, are "of opinion that it is only such nullities as grow out of prohi- "bitions, *having for their first and principal object, reasons of* "*public utility, that strangers can set up in their defense;* and

"that, whenever the nullity is pronounced by the law more in "relation to the individual than the public, the party intended "to be protected, can only claim the benefit of it. Others, of "equal celebrity, reject the distinction, and think, that, whenever the contract claimed under is declared null for want of "certain formalities, no person can claim under it."

The nullity of the conveyance from Roberto results as we have seen, from its being in violation of legal prohibitions, having for their first and principal object public order and public utility, and, therefore, in the language of Escriche above cited, cannot be made good either by ratification or prescription, and may, as implied by the language of the court in *Spencer* v. *Grimball*, be set up by a stranger in his defense.

I am aware that the case last cited may be claimed to have decided the contrary of the conclusion to which I have arrived. Were that, indeed, so, I might perhaps think that we ought not to determine a point in opposition to the authority of that distinguished tribunal. The facts of that case, however, bear but a remote analogy to the facts of the case before us. The sale there was by a tribe of Indians—here, by an individual. The question there was, whether the Beloxi tribe of Indians had parted with the title to their lands. But it appeared that the sale was not, as in the case at bar, a private transaction, but a public act, passed before the commandant of Rapides, and approved by the governor of Louisiana. The Spanish law was thus substantially complied with. The only point decided by that case is, that it was not necessary that the sale should be at public auction, and in that conclusion I entirely concur.

I may be allowed to suggest, with the highest respect for the eminent legal ability of the judge who delivered the opinion of the court in *Spencer* v. *Grimball*, that the reasoning of that case, if extended beyond the precise facts to which it is there applied, can scarcely bear the test of examination. He likens the incapacity of Indians to the temporary disability to which minors are subject, and deduces the conclusion, that, because a sale from a minor is only voidable, therefore a sale from Indians is also only voidable. But we have seen from the author-

ity of *Escriche*, that whilst a contract with a person *de menor edad* is only voidable and subject merely to the rescission of the party, a contract with a lunatic on an infant under the age of seven years (*un niño*) is affected with that radical vice which prevents it from having any effect. A contract with an Indian partakes rather of the nature of a contract with *un niño*, or *un demente*, than of a contract with a person, who, though not having attained full age, has nevertheless passed the bounds of childhood. Again, it seems to be conceded in that case, that nullities growing out of prohibitions, which are founded upon reasons of public utility, may be taken advantage of by strangers in their defense; and such, we have seen, were the reasons for the prohibitions under consideration.

Nor do I deem it any answer to the view of the case I have taken, to say that the restraint on alienation in the grant from Micheltoreno to Roberto is a condition, for the breach of which only the government can interfere. It may be true as a general proposition, applicable between individuals, or even, perhaps, where the government is a party, when neither positive statute nor the general policy of the law has been contravened, that the breach of a condition can be taken advantage of only by the person who imposed it, or by one who is a privy either in contract or estate. But here is something more than a condition. It is an absolute prohibition—a prohibition, too, which is in perfect harmony with both the letter and spirit of Spanish and Mexican legislation for centuries. The policy of the law, for wise purposes, will not permit the white race to trade or traffic with the Indians in the lands granted to them by the government. That law and that policy, in addition to the plain terms of the original grant, have been disregarded by the plaintiffs, and the defendant, a stranger, is consequently permitted to avail himself of the nullity of their title.

The policy referred to is not peculiar to Spain or to Mexico, but is adopted and adhered to in the United States. There, Indians are permitted to sell their lands under the superintendence of an agent of the government, whilst a private sale is void, and

ineffectual for any purpose, even to support a colorable claim of title.

A case strongly analogous to the one at bar, has been decided by the supreme court of the state of New York. (*Jackson ex dem. Gilbert* v. *Wood*, 7 *J. R.* 290.) It there appeared that a patent for a lot of land had been issued to an Oneida Indian, "to hold unto him and his heirs and assigns forever." The patentee died leaving two sons, his heirs, who sold and conveyed the land to A. It was held that the sale and conveyance were void, they not having received the consent of the legislature, or the approval of the surveyor-general, as required by law. Kent, Ch. J., delivering the opinion of the court, says: "The various "regulations in the act of 1801, all show the sense of the legis- "lature, that an Indian, in his individual capacity, is, in a great "degree, *inops consilii*, and unfit to make contracts, unless with "the consent, and under the protection, of a civil magistrate. "The law not only protects Indians from any suit upon their "contracts, but it declares specially, that all alienations of land "by the Brothertown and New Stockbridge Indians, are void. "These are just and humane guards against the imposition and "frauds, which that unfortunate people have not the power to "withstand. The same provisions prevail in the Spanish co- "lonies. None of the Indians within the Spanish dominions "can dispose of their real property, without the intervention of "a magistrate." Again he says, (*p.* 297,) "these statutes "ought to be construed liberally. The principles of public po- "licy, a sense of justice and humanity, the honor of the state, "and the conclusions of law, require us to consider such con- "tracts as made with persons unfit to contract without the ad- "vice of disinterested counsel."

If any reasons were needed in addition to those above advanced, to maintain the justice and wisdom of the policy of the law, they might be gathered from this very case. Roberto the Indian conveyed, in payment of a precedent debt of five hundred dollars, an estate which the proof shows to be worth one hundred thousand dollars; and though the value of the land is, doubtless, greatly enhanced since the conveyance, there can, I

think, be but little question, that, at the time of the sale, this tract of land, as fertile probably as any in the state, was worth more than twenty-three cents an acre.

The sole question remaining is, as to what effect should be given to the stipulation, which I noticed in the outset. In all cases coming up from courts of First Instance, I am disposed, owing to the want of form and regularity in their proceedings, to look on an application for a new trial with great favor; and if, in this case, I supposed that the plaintiffs could make out an actual possession without resorting to their title, and an eviction by the defendant of the character required, I should feel disposed to waive the strict construction, which, if the stipulation had been given under the present system of practice, ought to be applied to it. But the cause seems to have been thoroughly tried, and the evidence fully returned; and I do not see how it is possible for the plaintiffs to make out a possession without resorting to their title, and the moment they invoke the aid of that, they show that they could never have acquired possession beyond the metes and bounds of their actual occupation. A new trial would, consequently, be but an useless expense; I think it should be refused, and the judgment be affirmed.

Ordered accordingly.

Hastings, Ch. J. (dissenting.) The plaintiffs sued to recover a tract of land, alleging that for more than two years they had been in the peaceable, public, and uninterrupted possession of the land, as owners, and that, shortly before the commencement of their suit, the defendants forcibly entered upon and detained it, and that, when the plaintiffs had erected a building upon the land, the defendants came with force and drove away the plaintiffs' workmen, and destroyed their building. The plaintiffs seek to be restored to the possession, and to recover damages. The defendants deny all the allegations of the petition, and claim back one hundred and sixty acres of the land under the pre-emption laws of the United States. The defendant Hepburn justifies the destruction of the plaintiffs' building on the

ground that it was erected within the furrow which marked the lines of his settlement, and was a nuisance. The other defendants justify as his agents and servants. He also claims damages in re-convention from the plaintiffs, on the ground that they have erected another building within his enclosure. The record contains all the evidence given on the trial. The plaintiffs insist that the verdict is contrary to the law and evidence. The law of evidence in actions of ejectment at common law has been appealed to on the argument of this cause and an effort made to place the plaintiffs in the position of parties setting up title, and seeking to acquire possession, but we should look to the remedies existing at the time when the action was brought under the system of jurisprudence then in force. The Spanish law as modified by statute, and not repugnant to the Republican institutions of Mexico, was the law of California up to the time of the acquisition of the country by the United States. (1 *Alvarez*, 16—5 *Col. de Dec.* 1—1 *Febrero Mexicano*, 27.) And that acquisition effected no change in the law regulating the rights or relations of individuals. (*Hal. Dig.* 200—411 *Vattel*—3 *Part.* 199, 200, 201—1 *Pet. R.* 57, 542, and other cases cited in *6th*, *7th*, *9th*, *10th*, *12th*, *Pet. Rep.*)

The different kinds of possession for the recovery of which possessory actions are sustained in the Spanish and civil law, the two interdicts summary and plenary instituted for the recovery of such possession, are fully examined in my dissenting opinion in the case of *Woodworth* v. *Fulton et al.*, to which case reference is now made, for a better understanding of the rights and remedies of a party despoiled of possession of immoveable property. This action is purely a possessory one, the plenary interdict. No title in the plaintiffs is alleged, but a possession under a claim of title in good faith for more than a year and a day.

To maintain their right to recover it is only necessary in this action for the plaintiffs to show their own possession for that length of time, and the entry of the defendants. The question of title cannot be raised. In Louisiana, whose system of law is derived from the same source as that which prevailed here, pos-

session for a year gives presumptive title; upon proof of such possession in a possessory action brought within a year, a party can recover the possession even against the true owner, who would not be permitted to set up his own title as a defense, but would be driven to his petitory action. (*Code of Pr.* 46, 47, 49, 53.) The distinction between petitory and possessory actions is so well marked, that these actions cannot be joined unless by consent. (*C. P. Art.* 55.) That in the latter class of actions the defendant cannot plead title has been repeatedly decided in the Louisiana courts. (7 *N. S.* 486; 7 *L. R.* 415; 10 *L. R.* 140.) Nor can the jury examine as to title. (6 *L. R.* 559.) Nor is either party allowed to introduce evidence of title. (*C. P. Art.* 53; *C. C.* 3418; 7 *L. R.* 415.) Though an exception to this last rule would probably take place when the extent of possession is disputed. (6 *L. R.* 56.) The Spanish law equally recognizes this distinction between suits claiming possession and those claiming property. (3 *Part. tit.* 2, *C.* 27; *Dic. de Esc.* "*Juicio petitorio;*" 1 *Febrero Tapia*, 227.) It is adopted by special enactment in Mexico. (8 *Col. de Dec.* 227.) It will be seen by reference to these authorities, that, when an action is brought to recover the possession, the right to the possession must be determined before the right to the property. The same terms are employed in the Spanish law as in that of Louisiana to distinguish these actions. (*Dic. de Esc.* "*Juicio petitorio y posesorio.*") As to the forms of proceedings in these actions, see same work. ("*Juicio pet.,*" "*Interdicto,*" "*Despojo.*") To entitle a person to recover in either of these forms of action, possession for a year and a day is sufficient. (*Same work above cited; and* 1 *Febrero Tapia*, 229; 1 *Feb. Nov.* 353–355.) The only difference observable between the Spanish law and that of Louisiana, is that, in the latter, a defendant is not permitted to offer evidence of title, while in the former, as appears from an authority quoted, he may defend himself on the ground of title, if ready to establish it immediately by satisfactory proof. (3 *Part. tit.* 2, *c.* 27.) It is said, however, that this authority is not sustained by any other.

But the defendants set up title. They claim a right by virtue

of the pre-emption laws, to enter upon the premises as a part of the public domain. Such a claim can hardly be urged seriously, as it is well known that no pre-emption law was, or is, in force in this country.

The land in controversy, a half league, was granted in 1844, by the government to Roberto, an *emancipated* Indian, and was subsequently conveyed by him to Suñol, one of the plaintiffs, who sold an undivided interest in it to the other plaintiffs. The act of emancipation of Roberto, the grant to him, his conveyance to Suñol, the confirmation of that conveyance by his heirs, the order of the Alcalde putting Suñol in *judicial* possession, and the survey of the land were given in evidence to show that these parties claimed as owners under title and in good faith, and to show the extent of their possession. It appears from the testimony that there was an actual occupation of portions of the land by Roberto or those who claim under him from the time of the grant, and even before it, down to the time when this suit was commenced, and a constant exercise of acts of ownership over the whole tract until the defendants entered. The defendants entered that portion of the land which had, prior to their entry, been surveyed into a town, and after their entry the survey stakes were visible. On the 14th of Dec. 1849, the day prior to Suñol's conveyance to Naglee and Sansevaine, Naglee, in company with Whiting, examined the premises. Ledbetter's survey was completed on that day. Hepburn's house was not then on the land, but it seems he occupied a tent on the *alameda*, a few yards from the line and limits of the town survey and tract of land claimed by the plaintiffs. The defendants, therefore, must have known and had notice of plaintiffs' claim to possession at least, and this was acknowledged to one of defendants' witnesses.

Does this evidence prove a sufficient possession? or is it requisite that the whole tract should have been inclosed, or cultivated? In Louisiana an actual occupation is not required. Possession of part with a claim of title to the whole, or where there has been a natural possession not abandoned, a civil possession only is sufficient. (*C. P.* 49; *C. C.* 3394, 3389–90–91,

3417; *Bernard* v. *Shaw*, 9 *M. R.* 79; *Mayfield* v. *Morris*, 10 *L. R.* 442, *and* 15 *L. R.* 561; 19 *L. R.* 253.) Under the Spanish law, too, a mere civil possession is sufficient, provided the possessor hold in good faith and by virtue of a title translative of property. And it seems, without these qualities, one who holds property holds it *precariously*. He is not a possessor. His occupancy will not grow into a right of possession in any length of time short of that required to prescribe for the property in the land. (*Esc. Dic.* "*Posesion*," 543; *same* 534; 3 *Part. tit.* 30, *c.* 1, 6; 1 *Febrero Tapia*, 229, 231, 230; *7th Febrero Tapia*, 32, *sec.* 11; *Ordenanzas de Tierras y Aguas*, 12, 13, 17, 18.) In the whole Spanish law there is nothing as yet submitted to this court that will justify the opinion that possession must be an actual occupancy or it cannot be asserted. The term actual possession is not unknown to that law, but it has a peculiar and technical meaning. (*Dic. de Esc.* "*Posesion Actual, Artificiosa.*")

But from the testimony it is evident that the plaintiffs had the actual possession, at the time of the entry of the defendants. The part inclosed by defendants' furrow was in their actual occupancy, having been surveyed into a town. Stakes and maps existed indicating especially to the defendants, whose tent was but a few feet from the line, the possession of the plaintiffs. As to these defendants, then, without proof of any other possession or acts of ownership, at common law, the plaintiffs could recover in a summary action. It was not necessary that the premises should be actually inclosed with a fence; any improvements or monuments which show the land to have been occupied by another, and there being no evidence of an abandonment, are sufficient. (See cases cited in *Woodworth* v. *Fulton*, decided at this term; *Ellicott & Meredith* v. *Pearl*, 10 *Pet. Rep.* 441; *Ewing* v. *Burnet*, 11 *Pet. Rep.* 52.)

The fact of possession in the plaintiffs being established, either natural or civil, to a part of the land granted to Roberto, it becomes perhaps the most difficult question in this case to ascertain the extent of such possession. Both the Spanish and common law writers agree that he who is in possession of a

part of a tract of land under claim of title in good faith, with specified metes and bounds, possesses to the extent thereof. (See authorities referred to in *Woodworth* v. *Fulton*.)

The plaintiffs have a deed executed in the usual form to impart title, (*Apt to transfer property*,) describing the premises by certain monuments, courses, and distances, not very distinctly defined however, nor clearly understood, but perhaps sufficient with the aid of oral proof.

But it is said the deed from Roberto to Suñol is void, as an Indian could not alienate his property but in the manner prescribed by law; that Suñol was bound to know the law, and to know that the conveyance of Roberto was void, and transferred no title. Suñol not only purchased of Roberto, but also of his heirs, after his decease. The other plaintiffs purchased of Suñol. If these conveyances do not furnish colorable title which would be sufficient in adverse possession or prescription, then the decisions of the courts in the case of *Jackson* v. *Newton*, (18 *Johnson's Rep.* 355;) *Northrop* v. *Wright*, (7 *Hill*, *Rep.* 468–9;) *La Frambois* v. *Jackson* (8 *Cowen*, 589;) and the doctrines of the Spanish law writers referred to in *Woodworth* v. *Fulton*, and the uniform decisions of the courts of Louisiana, are not law.

The idea that an Indian could not convey land is derived from the various laws and royal ordinances relating to the government of the Indians, which were promulgated at different periods between the years 1551 and 1787. (*Ord. de Tierras y Aguas*, 97, 112; 2 *White's Recop.* 703.) One of these (24 *May*, 1571) prescribes the formalities which shall be observed by the Indians in making sales of their property, and declares void all sales made without those formalities. These regulations were intended for the protection of those Indians who formed separate communities, and lived in the *Pueblos*, as the mere occupants of the lands from which they had never been ejected, and the title to which was in the crown. That this is the object of those laws is apparent from their perusal.

Admitting that a conveyance by an Indian was prohibited by the law, it was for the benefit of the Indian that the prohi-

bition was made. Though his deed might be void as to himself and his heirs, it was good as to all others. There are two cases in the decisions of the supreme court of Louisiana to this effect. In the case of *Martin* v. *Johnson et al.*, (5 *M. R.* 655,) the defendants claimed under a deed from Indians. It was objected that the deed did not transfer the title, as such alienations were prohibited by law, unless the sale was made at auction, which was not the case here. The court held, that if the objection was well founded "the Indians would not have been "legally divested of their title, and could, perhaps, take ad-"vantage of it against the defendants; but until then the de-"fendants held in their right and cannot be disturbed by "others." In *Spencer's heirs* v. *Grimball*, (6 *N. S.* 355,) where the plaintiffs claimed under such a deed, the court said, "If a "sale by the Indians was followed by payment of the price "and delivery of the property, no person can take advan-"tage of an informality in the mode of making it but the In-"dians." In this case the court makes a distinction between a nullity which is absolute, and one which is relative—founded upon the object of the law which prohibits an act and declares it void. Where the act is prohibited from motives of public policy, the nullity is absolute; when the intention is to give protection to individuals, it is relative. In the former, the act is absolutely void, in the other, it is voidable only, as a deed by a minor, which no one can avoid but the minor himself, and even he is bound by it after he arrives at his majority, if he do not dissent.

The Indians were considered as persons under legal disability, and their legal protectors stand in the light of guardians, and although of age, they enjoyed the rights of minors to avoid contracts or other disposition of their property, particularly real, made without the authority of the judiciary, or the intervention of their legal protectors. (2*d White's Recop.* 704.)

These laws then would not render absolutely void a deed from an Indian, but voidable only, as in the case of infants under guardians. The Indians were under a state of pupilage. But in this case the Indian, Roberto, as he is called, was, at the time of his sale to Suñol, under no such disability. He was an

emancipated Indian, having no legal protectors. Upon an examination of the decisions in the courts of Louisiana it appears that they are all made in cases where the lands in controversy were *Pueblo* lands, or those in the occupancy of an Indian tribe or community. It is believed that there is a manifest distinction between such cases and that of a grant by the government to an Indian as a settler or citizen.

It is argued with much plausible reasoning, the correctness of which cannot well be controverted, that the grantee, Roberto, was a Mexican citizen according to the terms of the constitution; that it was only as a Mexican citizen that such a grant could be made to him, it being expressly prohibited by the colonization law to all others than Mexican citizens; and that the grant was made by the competent authority, whose acts are to be presumed to be valid.

Upon the point that Roberto was under no disability, reference is made to 1 *Febrero Mexicano*, *p.* 96, *sec.* 48: "In "the ancient laws other distinctions are made between men on "account of their races and colors, and of these the principal "was the one between Indians and Spaniards. So odious a "classification has not existed in the republic since it declared "itself sovereign and independent, and principally since the "Plan of Iguala declared all inhabitants to be equal in rights "without distinction between Europeans, Africans and Indians." The 12th article of the Plan of Iguala declares, "all the inha- "bitants of New Spain, without distinction between Europeans, "Africans or Indians, are citizens of this monarchy, with a "right to hold office according to their merit and virtues." (1 *Col. de Dec.* 4.) In the same work, (*p.* 257, *sec.* 1,) it is said, "Anciently the Indians also were reputed minors under the "age of five and twenty years, although they were above that "age; but now it is expressly declared that, allowing them to "be equal to other citizens, they are no longer in a state of "minority;" and this clause refers to a circular of 11th of January, 1821. The Indian, then, rests no longer under that state of pupilage in which the law formerly placed him.

It seems that the grant to Roberto contains conditions prohi-

biting an alienation, and for this reason, it is said, the sale to Suñol was void. What right or authority had the governor to impose such an odious incumbrance on a grant? No authority has been shown, no statute or decree of the general government prescribing such to be the form of grants to *emancipated* Indians; and it is believed no law can be referred to which will authorize the introduction of such odious conditions in a grant. These conditions were and are absolutely void, interposed without authority of law, and the grant is to be construed as if no such obstacles had been inserted.

The Indian Roberto was a citizen of the Republic, enjoying all the rights and privileges of any other citizen of Mexico, and was eligible to office according to his merits and virtues. This is admitted. Yet it is said that a Mexican citizen, because he happens to be of Indian blood, or an *emancipated* Indian, shall not, and cannot, transfer his property in real estate, without permission, and under the direction of a judicial officer, as if he were an insane person, lunatic, or infant. It appears evident that to be a citizen, enjoying equal rights with other citizens of the Republic, the Indian must enjoy the right to alienate his property without restraint—the right to think and act for himself. It is matter of history that some of the wealthiest citizens of this state, at the present time, are either Indians of full or half blood. They are men of wealth, intelligence, and education, and yet by the *Plan of Iguala*, as well as by the principles of the Republican Institutions of Mexico, they have no superior social rights to the Indian Roberto, nor any higher legal privileges.

The policy of the Royal government of Spain, regulating the intercourse with the Indians, humane as it may have been, differed widely from the system of trade and intercourse with the Indian tribes adopted by the government of the United States.

The United States have never elevated the Indian to an equality in rights and privileges with the white race; if so, trade and traffic in property, real and personal, would be free, and not positively *inhibited* by the National Legislature.

Entertaining these views, and governed by the law as I understand it, I believe the following conclusions to be correct:—

1st. If the *grantee Roberto* were under the disability sought to be established, the plaintiffs having purchased in good faith, have a *colorable* claim of title.

2d. That, if under such incapacity, no third party can take advantage of it; the sale could be avoided only by Roberto, his heirs, or the government.

3d. That all restraints upon Indians, in the alienation of their real property, appear to have been abolished.

4th. That the plaintiffs had, at the time of the entry of defendants, actual possession of a part of the premises conveyed, in the name of the whole.

5th. That such possession is good for the entire tract within the specified metes and bounds.

6th. That they can sustain their action to oust any intruder without title.

I think, therefore, the judgment of the court of First Instance should be reversed, and a new trial had. (*a*)

(*a*) After the decision of the above cause, another motion for a re-hearing was made, on which occasion the opinion of the court was delivered by

Bennett, J. This cause has been twice argued; once by counsel for both parties, and again *ex parte*, on behalf of the plaintiffs. An application is now made for a re-hearing. No new arguments are advanced, and no additional authorities cited. Indeed, the plaintiffs state, in their petition for a re-hearing, that "no new views "are sought to be offered." The old views have been twice presented to the court, and twice considered by it, and as the court is satisfied that its former decision is in conformity both with law and justice, it sees no reason why that decision should be disturbed.

It is proper, however, to observe that our former judgment did not pretend to define the quantity of land of which the defendant was in possession. This could not well have been done under the pleadings. It barely decides that the plaintiffs showed no right to oust the defendant from any portion of the land claimed by the plaintiffs, the *actual possession* of which the defendant, Hepburn, had at the time the suit was brought.

Re-hearing denied.

WOODWORTH *vs.* FULTON *et al.*

A grant of public lands in San Francisco made by an *American* Alcalde, during the continuance of the war between the United States and Mexico, is void; and the grantee acquires neither title nor *color* of title. An Alcalde had no authority, either from the Mexican or American government, to make grants of public lands, or to convey the lands of private individuals, whether they were natural or artificial persons.

The lands lying within the corporate limits of San Francisco, which had not been granted by the Mexican government, or its officers, previous to the conquest of the country by the American forces, constitute a part of the public domain of the United States, and cannot be transferred, except under the authority of Congress.

The title of the United States to the public domain in California, relates back to the time of the occupation of the country by the American army; and from that period, the Mexican laws in relation to the disposition of public lands ceased to be of force.

A person claiming, under an Alcalde's grant made in 1847, title to a 100 *vara* lot of land in San Francisco, cannot maintain a possessory action or an action of ejectment against a person in actual possession, upon the ground that the Alcalde's grantee went upon the lot, in 1848, to take possession, and drove some stakes, and cleared away some brush for the purpose of erecting a dwelling house, when it appeared that he performed no other acts of ownership either at that time or subsequently.

An Alcalde's grantee is chargeable with knowledge that the Alcalde had no authority to make the grant.

In ejectment, the plaintiff must recover on the strength of his own title, and cannot, in general, found his claim upon the insufficiency of the defendant's title.

Whether an action of ejectment can be sustained on the sole ground of prior possession, when it is shown that the plaintiff has no title; Query? If it may, the acts to make out the possession must be definite, positive and notorious.

APPEAL from the court of First Instance of the district of San Francisco. The action was brought to recover possession of a portion of a 100 *vara* lot in the city of San Francisco. The defendants were in the actual possession of the lot claimed, having purchased it of a third person for a full consideration, and having erected valuable improvements upon it.

The plaintiff claimed to recover by virtue of a grant from an Alcalde of San Francisco, of which the following is a copy :—

"To Edwin Bryant, Esq., Alcalde of the District of San

"Francisco:—Your petitioner being a citizen of California, "according to the proclamation of his excellency, Commodore "R. F. Stockton, and a resident of the town of San Francisco, "would respectfully solicit for the grant of a title to a lot of "land, No. 22, containing one hundred *varas* square, in the "vicinity of the town of San Francisco, the said lot being "a corner lot, and marked in the plan or map now exhibited "in your office, now vacant and unoccupied; upon which he "intends to erect a dwelling house, according to the rules and "regulations governing in such cases; and desires that he may "be put in possession thereof as soon as your convenience will "permit.

(Signed,) "S. E. WOODWORTH, U. S. Navy.

"Whereas S. E. Woodworth has presented the foregoing "petition soliciting for the grant of a title to a lot of land in "the vicinity of the town of San Francisco, containing one "hundred *varas* square, as therein described; therefore, I, the "undersigned Alcalde, do hereby give, grant and convey the "said lot number twenty-two (22) unto the said S. E. Wood-"worth, his heirs and assigns forever, subject to the following "conditions:—

"First. That the said S. E. Woodworth, his heirs or assigns, "shall erect or cause to be erected a dwelling house on said "premises, within one year from the date of these presents.

"Second. That the said S. E. Woodworth, his heirs and as-"signs, shall enclose or cause to be enclosed said lot with a suit-"able fence.

"Third. And to be subject to all rules and regulations "governing in such cases.

"In testimony whereof I have hereunto set my hand and "subscribed my name as Alcalde, this 15th day of April, A.D. "1837.

(Signed,) "EDWIN BRYANT, Chief Magistrate."

In addition to this paper the plaintiff relied upon certain acts of possession which he performed in 1848, and which, he insisted, entitled him to judgment although his title should be held

to be invalid. These are noticed in the opinion of the court. The cause was argued by

Edward Norton, for the plaintiff, who made the following points:—

I. The plaintiff, having the legal paper title, was entitled to the possession.

1. It is a part of the history of this country, of which the court will take notice, that Alcaldes' grants, at least under the Mexican dominion, conveyed a title sufficient to enable the grantee to take, hold, and recover possession of municipal lands. (*Henthorn* v. *Doe*, 1 *Blackford*, 159; 1 *Kent's Comm.* 470–473.)

2. The authority of Alcaldes to make such grants continued under the American dominion.

Because, The town lands, being the property of the *pueblo*, did not pass to the United States as part of the public domain and could be legally granted by the town authorities in accordance with the municipal laws of the conquered country, which continued in force until others were substituted. (*Halleck's Report, page* 9; *Peachy's Report to Com. Council, March* 5, 1850; *Bryant's* "*What I saw in California*," 437–439; *Proclamation of General Kearney*, *Bryant*, 431; *The Ordinance of the Town Council.*) As to the exercise of the power by the town authorities, *see* 1 *Kent's Comm.* 470–473.

And because, If the *pueblo* lands did pass to the United States, the grants have been authorized and sanctioned by the United States. (*Acts of Genl. Kearney and of Alcaldes appointed by him*, *Bryant*, 437, 439.)

3. Both parties claim under the same source of title, and the plaintiff's grant, being the older, is the better. (*See recital in Deed to Fulton; Penrose* v. *Griffith*, 4 *Binn.* 231; *Chambers* v. *The People*, 4 *Scammon*, 351; *Riddle* v. *Murphy*, 7 *Sergeant and Rawle*, 230.)

4. The grant was lawfully made by American authority to an American citizen, because, at the time, the country was held by

the United States by right of conquest and the treaty confirmed their title and related back to its inception. (*Wheaton's Law of Nations*, 208, 396, 440.)

5. The conditions of the grant were abrogated by the party that imposed them. If not, the title is not divested until re-entry after legal *denouncement*. (*See Ordinance; Case fol.* 8, 9.)

II. The prior possession of the plaintiff was sufficient to authorize him to be restored. (1 *White's Recop.* 87, *cap.* 4; *Escriche's Dic.* 541; *Jackson* v. *Hubble*, 1 *Cowen*, 613; *Whitney* v. *Wright*, 15 *Wend.* 171; *Wheeler* v. *Rogers*, 4 *Hill*, 466; *Carpenter* v. *Weeks*, 2 *Hill*, 341; *New York Reports.—Den* v. *Sinnickson*, 4 *Halstead*, 149; *New Jersey.—Ellithorp* v. *Dening*, 1 *Chipman*, 141; *Vermont.—Hoey* v. *Furman*, 1 *Penn. State Rep.* 295; *Pennsylvania.—Hutchins* v. *Erickson*, 1 *Har. and McHenry*, 339; *Maryland.—Ludlow's Heirs* v. *McBride*, 3 *Ham.* 240; *Ohio.—Jackson* v. *Porter*, *Paine*, 457; *2d Circuit.—Robinson* v. *Doe*, 6 *Blackford*, 85; *Indiana.*)

1. The plaintiff had *actual* possession of the whole lot under claim of title, and adverse to all the world.

The petition and act of taking possession show the good faith. (*Escriche's Dic.* 541; 1 *White's Rec.* 87, 92; 7 *Feb. Tapia*, 33; *Northrop* v. *Wright*, 7 *Hill*, 488; *Jackson* v. *Newton*, 18 *J. R.* 355; *Gardner* v. *Heart*, 1 *Comstock*, 528; *Cook* v. *Rider*, 16 *Pickering*, 186.)

2. The plaintiff's entry being by color of a deed, his possession extended by construction to the limits of the premises described in his deed. (*Ellicott* v. *Pearl*, 10 *Pet.* 412; *Hammond* v. *Ridgley*, 5 *Har. & J.* 245; *Jackson* v. *Camp*, 1 *Cowen*, 605–9; *Hoey* v. *Furman*, 1 *Penn. State Rep.* 295; *Numerous Cases cited in 3d vol. U. S. Digest*, 411, *No.* 177.)

3. The plaintiff's right, being established, continues, without an actual *pedis possessio*, unless a presumption is raised that he has abandoned his claim, and that was a fact to be passed upon by the jury. (1 *White's Rec.* 93, *sec.* 5; 1 *Domat*, 481, *sec.* 24; *Whitney* v. *Wright*, 15 *Wend.* 171; *New York.—Myers* v. *McMillan*, 4 *Dana*, 485; *Kentucky.—Warner* v. *Paige*, 4

Vermont, 291; *Vermont.—Ellicott* v. *Pearl*, 1 *McLean*, 206; *7th Circuit.—Mazyck* v. *Birt*, 2 *Brevard*, 155; *South Carolina.* —*Sanger* v. *Newland*, 9 *Vermont*, 383; *Cook* v. *Rider*, 16 *Pickering*, 186; *Massachusetts.*)

R. A. Wilson, for the defendants, insisted that the judgment of the court below ought to be reversed on the grounds that plaintiff had shown neither title, nor possession of the premises in controversy; that the proceedings in the court below were a combination of the summary action of possession, and a petitory action upon title, and that plaintiff had failed to make out a case in either form of proceeding.

The paper offered in evidence by plaintiff to establish his title, had none of the characteristics of a title deed, or of a buying and selling contract under the civil law. It is without seal, without subscribing witnesses, without a notarial act of verification, and without consideration, and purports to be a gift by a public officer, by virtue of his office. The question is, whether it was ever intended by the grantor for a title deed, and if so, whether he had a right, by virtue of his office, to make the grant.

Mr. Edwin Bryant, addressed by the title of "Alcalde," but holding a commission from the commander of the American invading army, of chief magistrate and justice of the district of San Francisco, was not a municipal officer of the incorporated town, (*Pueblo*,) of Yerba Buena, if there ever was such an incorporation. He was but a civil lieutenant of the commanding general, whose duties were limited necessarily to the preservation of order and the maintenance of authority over a conquered village; possessing from necessity the right to determine personal actions, that arose from time to time, during the continuance of the military occupation, and until such time as the magistracy and laws of the conquered party should be reinstated, or the territory annexed to the dominions of the conqueror by a treaty. (*Vattel, p.* 395, *sec.* 212.) During this military occupancy, neither the commanding general, nor any of his lieutenants, had the right to make a grant of lands, either out of the

public domain, or out of the lands of individuals or *pueblos*. Nor did the United States at that time possess a sufficient property in the lands of the conquered territory to give a valid title. (*Vattel, p.* 391, *sec.* 202, *p.* 386, *sec.* 197.) From these premises the inference is irresistible that Mr. Bryant had no authority by the law of nations to make the grant, and he manifestly had no such authority by the laws of his own country.

The next exception taken in the court below was that the plaintiff was an officer in the naval service of the United States. It was his duty to preserve, as far as lay in his power, the conquests of his country. For doing this he was paid. In attempting to acquire an individual property in this land, he violated principles of discipline, and principles of law as old as the civil law itself. (*Ayliffe's Pandects, p.* 287; *Vattel, p.* 365, *sec.* 164, 165.)

But it may be said that in these military agricultural establishments, or colonies known as *pueblos*, the fee of the whole land is in the society itself; and that after a new colonist has paid his initiation fee of six dollars and two *reales*, he is entitled to have assigned to him a house lot, which only operating as a permit to take possession of a vacant lot, the possessor acquires an indefeasible interest therein, in consequence of complying with all the requirements of the law, in making improvements; that the town council having dispensed with the condition imposed by the law, and plaintiff having taken formal possession of the lot, and exercised acts of ownership over it, the objection taken to his citizenship, residence, and to the title in the United States, is cured by the treaty of acquisition, and by the subsequent residence of plaintiff.

But this by no means removes the difficulty. An act which is in violation of discipline in a soldier, is to be treated with the same disfavor by the courts, when it is brought before them, as an act which is against good morals in a citizen. For the peace of society is as deeply involved in the preservation of the one as in the maintenance of the other. And if any doubts exist in relation to this claim of plaintiff, they must be most strongly construed against the man, who avails himself of his position in

the army or navy to acquire rights reserved solely for persons in a civil state. The resolution of the town council setting aside the law of the land, is almost too absurd to deserve a grave consideration. This council, it appears from page 378, of President Taylor's California message and documents, was established under a permit or charter from an American colonel of dragoons, and this council was composed of citizens of the conquering nation, whose residence in the town depended on the protection of the invading army. But, if this council had been the lawful Mexican *ayuntamiento*, it could not have dispensed with the conditions of building a house and making a fence around the lot, within a year. This was a general law, to which all *pueblos* were subjected in making grants; and these *ayuntamientos* in the distribution of house lots, and of out-lying lots, were but the almoners of the supreme government of Mexico, in the dispensing of a public charity. The *ayuntamientos*, clearly, could not alter the conditions of the trust imposed upon them by the Mexican government. Hence, plaintiff having neglected for a period of two years to improve his lot, he was deemed in law to have renounced his grant, and the proper municipal magistrate might grant it to another. (*Colonization Law, art.* 23, *White, vol.* 1, *p.* 591.) So that Justice Colton, in making a grant of the lot to Atwill, the grantor of defendants, was performing a duty imposed upon him by the law. (*See letter of instructions of Prefect to Don Pablo Guerrero, J. P. of* 1839 : *of the same to the same of* 1841 : *of the same to the same of* 1842 : *in Book B. of Spanish Records of San Francisco.*) So that on the question of title, the law is clearly on the side of the defendants; and I may say further that when, by the law of the supreme government of Mexico of the 23d March 1837, *ayuntamientos* and alcaldes were abolished in all the villages of California, except the capital, and their powers vested in a justice of the peace, appointed by the Prefect of the district, (*Riley's Digest, p.* 13, *sec.* 5, *art.* 1,) the attempt to organize a town council, without legislative authority, at any time after the formal surrender of franchises and powers to *Guerrero, J. P.*

is clearly a usurpation, and all acts and doings of such a body are utterly null and void.

But, considering this suit as one of plenary possession, plaintiff must fail, for he has not shown that defendants gained possession by force, or fraud, or any clandestine means. (*Institutes Lib.* 4; *Title*, 15, *sec.* 4; *Ayliffe's Pandects*, 338, 339, 341; *Domat*, *vol.* 1, *p.* 472, *sec.* 13.)

This summary action is allowed at common law only in cases where actual force has been used in ejecting the former occupant. But under the civil law the grounds for this action are much more enlarged, and a party is entitled to this action who has been ejected from his possession by force, or fraud, or clandestine means, or even precariously, viz.: having entered under the plaintiff. And also preliminary to a petitory action, a trial of this kind is allowed for the purpose of determining which party shall hold the possession of the land during the pendency of a suit on title. But on neither of these grounds can this action be maintained. Defendants having purchased at a public auction for a full cash consideration an unoccupied lot, lying in a wild state, they inclosed the same with a fence and were proceeding to erect a house thereon, when they were served with process in this suit. There was no evidence going to show that defendants had any knowledge of plaintiff's claim. Nor were there any marks on the lot, calculated to bring home to defendants a knowledge that the lot was claimed by any other person. There were survey stakes at the corners of the 100 *vara* lot, of which the premises in controversy were a part, but whether these stakes were originally placed there by the town surveyor, or by plaintiff, or by the grantor of defendants, does not appear. Plaintiff therefore did not lose the possession by force, or fraud, or any clandestine means, nor could he treat this as a preliminary action, as his pretended title is the foundation of his suit. And claiming the lot by a former naked possession, (his deed being a nullity,) he cannot eject defendants. (*Recopilacion*, *vol.* 1, *p.* 94, *sec.* 7, *p.* 347, *sec.* 20, *vol.* 2, *p.* 85; *Ayliffe's Pandects*, *p.* 399.)

With the argument of expediency I will conclude. It has

been said, that if this court reverses this judgment the titles to property, now valued at millions of dollars, will be overturned, and violence may be the result. But what has this court to do with questions of expediency? By the law and by the testimony alone are questions to be determined in this court, and to the law and to the testimony only can I appeal in presenting this cause. But if I were to present questions of expediency to a court, I should say that this is one of those cases, which calls loudly for the interposition of the court to relieve the city of San Francisco from one of the most intolerable burthens ever borne by any city in the civilized world. Persons connected with the army, or who came with the army, have seized upon all the valuable lands in the city, under one shallow pretence or another, in violation of every principle of the code of laws under which they claim, and have imposed a contribution in the shape of ground rent upon all the business and industry of the city. By the power and influence that the combination of great wealth in few hands gives to its possessors, inferior courts have been over-awed, and now the same system of threats and intimidation has been resorted to, to compel this court to affirm the judgment of the court below. But if this judgment shall be affirmed, then may any man, who, during the last fifteen years, chanced to take out a grant, look up his parchment, and demand to be put into possession of one or more of the finest buildings in the city. And how many dormant grants the affirmance of this judgment will bring into being, no man can tell; and from the facilities now enjoyed for manufacturing and ante-dating grants, it is hard to determine what the end will be, if this court should once depart from the track, which the law has pointed out. And if such loose and equivocal acts of possession are to disturb the occupants of lands and tenements years afterwards, then may occupants of lots in town tremble for their possessions, for they know not at what hour a returning Mexican may come, and insist that where a building stands at present he once pitched his tent, and exercised acts of ownership.

By the Court, BENNETT, J. The action is brought to recover possession of a lot of land in San Francisco. At the commencement of the suit the defendants were in the actual possession of the premises, having entered without force, fraud, or any clandestine means, and claiming to be *bona fide* occupants of the same under a written conveyance to them. When they took possession there were no visible signs that the lot had ever been improved, or cultivated, or occupied by any one. Some survey stakes had been driven at the corners of the large one hundred *vara* tract of which the lot in question is a subdivision, and some brush had been cut thereon, apparently for the use of tents in the vicinity. The land, in fact, was in a wild state. The defendants had the subdivision lot, which they occupy, surveyed, and have made valuable improvements upon it.

In June, 1848, the plaintiff claiming to be the owner of the one hundred *vara* lot, went upon it "to take possession," drove some stakes at the corners, and cleared away the brush for a dwelling on some portion of it, but what portion does not appear. There are no other acts, either at that time or since, showing possession on his part. It appears, however, that there was once, but at what period is not shown, a fence extending along the south side of Market-street, from the one hundred *vara* lot lying next westerly of the one claimed by the plaintiff, as far as the bay on the east, and that there were several cross fences extending from that fence southerly. When, or by whom, either of these fences was built does not appear; but there is not the slightest reason to suppose that the plaintiff, or those under whom he claims, had any thing to do with the construction of either of them. Before the entry of the defendants, all these fences had been destroyed, for the purpose, as is supposed, of supplying people who lived in tents in the neighborhood, with fuel. The above is the substance of the facts necessarily deducible from the testimony.

The claim of the plaintiff is based upon two grounds: First, that he has a perfect title to the lot; and, secondly, that he was once in possession of it.

To maintain his first position he relies solely upon a grant

from an alcalde of San Francisco, bearing date the 15th day of April, 1847. This grant was made by an American alcalde, not appointed by, nor holding office under, the authority of the Mexican government, to a citizen of the United States, during the continuance of the war between the United States and Mexico, whilst California was in the temporary occupation of the American forces, and before the title of the United States to the country had become complete. In other words, an inferior local officer, holding his place under the authority of a hostile army, while in the occupation of a portion of conquered territory, assumes the right and the power to dispose of the real estate of the vanquished to a citizen of the victorious country. The question is, whether he has such right or power? If he has, whence does he derive it? It must proceed from one of two sources; either from the Mexican government, or from the American government.

The bare statement of the fact, that he was not appointed by, nor held his office under, the authority of the Mexican Republic, but was an alien enemy acting in defiance of her sovereignty, is sufficient proof that, however strictly he may, in making the grant, have observed the formalities of Mexican law, he could have derived from that nation, neither right nor power to transfer the title to any portion of individual or public property. Had California, at the treaty of peace, been restored to Mexico, no man can entertain the idea, that the Mexican government, or the Mexican judiciary, proceeding upon their own municipal law, or upon the principles of international justice, would have regarded such a conveyance otherwise than as of no value or effect. The alcalde could, then, have derived no such power from the Mexican government.

Neither was he invested with any such authority by the American government, either mediately or immediately, directly or remotely. Conceding that he was an officer of the United States, there was yet no legislation by Congress, no action of the President or of either of the departments, not even a proclamation of commodore or general, which has come under my observation, which attempted to clothe him with the power of

disposing of the national domain of Mexico, or the private property of individuals or communities. There being, then, no special and express authority from the government of the United States, such authority must be deduced, if at all, from the law of nations, which, as it is a part of the laws of all civilized countries, forms also a branch of American jurisprudence.

By international law private rights are unaffected by conquest. (*Wheaton's International Law*, 396, *Part* 4, *chap.* 2, *sec.* 5.) The conqueror seizes on the possessions of the state, the public property, while private individuals are permitted to retain theirs. (*Vattel*, *Book* 3, *chap.* 13, *sec.* 200.) Nor can it make any difference whether the property belonged to a natural person, or to an artificial person. Vested rights in real estate have been respected by all civilized nations ever since the time of the conquest of England by William of Normandy. (*Wheaton*, 396, *ubi supra.*) It is claimed that San Francisco, as the lawful successor of Yerba Buena, was what is termed in Spanish law, a *pueblo;* and that being such, there was in some undefined manner, and under some vague system of things, vested in the people of the *pueblo*, or in the alcalde, or justice of the peace, or *ayuntamiento*, as representatives of the *pobladores*, an absolute title to a large tract of land, the limits of which have never, as yet, been ascertained farther than the city surveyor has been directed to run the lines of city lots. Whence or how that title was acquired, was not attempted to be explained on the argument; and I am not aware of any legislation, general or special, of Spain or Mexico, which vested the *pueblo* of Yerba Buena, or the town or city of San Francisco, with the title to a foot of land within their assumed boundaries. If, however, I am mistaken in this, and there was such vested title, the alcalde, an alien enemy of Mexico, and without authority from the American government, had no power or right to interfere with that vested estate.

There is also another difficulty in the plaintiff's case, in making out the power of the alcalde of San Francisco to grant lands, by virtue of his office; that is, it does not appear that San Francisco or Yerba Buena, was ever constituted a *pueblo*, or had

the rights of one; a fact, which, I think, should be established by proof, and of which courts cannot, and ought not to, take judicial notice; and, further, even admitting that it was a *pueblo*, there is still nothing in this case showing the boundaries of the *pueblo*, or that the lot in controversy lies within those boundaries.

Upon the ground, then, that the lot in question had, previous to the occupation of the country by the Americans, been severed from the mass of the public lands of the country, there is nothing to uphold the right of the alcalde to dispose of it.

I am, however, of the opinion that, even though San Francisco had become a *pueblo* previous to the conquest, and had been invested with all the rights incident to such character, the lands within its limits still continued a portion of the public domain. The full and absolute title of the nation to lands within the limits of *pueblos*, other than such as were, in limited quantities, expressly granted to the *pueblo* for the purpose of defraying certain expenses incidental to the administration of the local government, does not seem, in any case, so far as I have been able to ascertain, to have been divested or in the least impaired. It is true that to certain officers was committed the authority of parcelling out *pueblo* lands, subject to specific rules and restrictions imposed by law; but such officers appear to have acted rather as almoners of the supreme government in dispensing its bounty, than as agents of the *pueblos* in disposing of property, the title to which they held as municipal bodies. The United States, by the conquest of California, acquired an inchoate and imperfect title to all of the national domain of Mexico situated in that territory, which title was perfected by the treaty of peace. (*Wheaton's International Law*, *pp.* 208, 396, 440, *ed.* 1846; *Vattel*, 386.) The title of the United States relates back to the time of the occupation of the country; and, consequently, all laws of Mexico concerning the disposition of public lands must have ceased the moment California was effectually subdued and occupied by the American forces; and neither Mexican nor American officers had any power, under the previously existing laws, or under any laws of the United States, to grant,

sell, or in any way dispose of any portion of the national domain, which had thus been transferred from the sovereignty of Mexico to the sovereignty of the United States.

For the above reasons I think the title of the plaintiff of no validity. The Alcalde having no power to convey—it appearing on the face of the papers that he made the deed by color of his office—and the plaintiff being chargeable with knowledge of these facts, his title is not even colorable. (*Suñol* v. *Hepburn*, *ante*, *p.* 254.)

The remaining question for consideration relates to the possession of the plaintiff. It does not distinctly appear at what time the defendants entered upon the lot in controversy; but the case must be controlled by Mexican law, and I am of the opinion that it comes within the principle of *Suñol* v. *Hepburn*, decided at this term, and that the plaintiff cannot maintain a possessory action. The question to which I shall briefly advert, is whether ejectment can be maintained under the principles of the common law.

The defendant entered peaceably and quietly upon land which bore no marks of being in the occupation of any one. He entered with a claim of title under a written conveyance. He did not intrude upon the known possession of another by force, fraud, artifice, or by any secret or clandestine means; for aught that appears he took possession in perfect good faith. Under these circumstances, he may justly claim all the privileges, which, in an action of ejectment, are conceded to a defendant in actual possession. Mr. Chitty, in a note to *Blackstone's Commentaries*, (*vol.* 2, *p.* 196, *note* 1,) thus sums up the principles by which this form of action is governed:—"In general a "person in *actual possession* of real property cannot be ousted "unless the party claiming can establish some well founded "title, for it is a general rule, governing in all actions of ejectment, (the proper proceeding to recover possession of an "estate,) that the plaintiff must recover on the strength of his "own title, and of course he cannot in general found his claim "upon the insufficiency of the defendant's. For possession "gives the defendant a right against every person who cannot

" show a sufficient title, and the party who would change the " possession must therefore establish a perfect title; and this " rule it is said prevails even where a stranger who has no " color of title, should evict a person who has been in possession " short of twenty years, but who has not a strict legal title; " but according to *Allan* v. *Rivington*, (2 *Saund.* 111, *a. and* 6 " *Taunt.* 548, *n*,) a prior occupancy is a sufficient title against " a wrongdoer; but it is observed in a note to the first case, " *that this is contrary to the general use*, and it is suggested " that there is a mistake in terms." This is a succinct statement of the established principles of law applicable to the action of ejectment, and it appears from this and from the adjudicated cases cited by him, to be at the least doubtful, whether, at common law, an action of ejectment can, in any case, be supported upon the sole ground of prior possession, where such possession has not been continued for twenty years, nor been invaded by force or surprise. There are however some cases in American reports, which apparently seem to sanction such a doctrine. Such are the cases of *Jackson ex dem. Murray & Brown* v. *Hazen*, 2 *J. R.* 22; *Jackson ex dem. Murray et al.* v. *Dean*, 5 *Cow. Rep.* 200; *Smith* v. *Lorillard*, 10 *J. R.* 338; and *Jackson ex dem. Duncan* v. *Harder*, 4 *J. R.* 203. Whether these cases are, in truth, a departure from the common law rules of ejectment, it is difficult to say, owing to the meagre statement of facts embraced in the reports of them; and so far as the case at bar is concerned, it is a matter of no especial moment, for they assume as an established fact the very point here controverted, that is, the *prior possession*. It may however be remarked, that if they can be sustained upon any common law principle, it must be upon the ground that, possession being *prima facie* evidence of title, and there being no other evidence rebutting such *prima facie* evidence, the law will presume that one, who has been in the actual possession of premises, was the legal owner. But this is a mere presumption, which may be disproved by the defendant; why then should the plaintiff be permitted to recover, when he himself, by his own proof, rebuts this legal presumption? Thus in the case

before us, had the plaintiff, at the trial, proved himself to have been in the actual possession of the lot in question, the law would presume him to have been the owner; but when he adduces his title, which entirely overcomes the legal presumption of ownership, it is questionable whether on the common law principles of ejectment, he is entitled to recover. The defendant in ejectment may prove title out of the plaintiff—he may show it in himself or in a stranger, and thus bar the plaintiff's recovery; and it would be a little strange, if a fact, which, set up by the defendant, would avoid a recovery, should, when brought forward by the plaintiff, establish his cause of action. It is hardly probable that the common law ever tolerated such an absurdity.

But it is, perhaps, unnecessary to have considered this branch of the case at such length; for the fact, upon which the cases above cited from Johnson proceeded, is wanting in this case. The plaintiff never was in the actual possession of this lot. Some cases have gone great lengths in holding slight acts to be sufficient evidence of possession; but I know of no case, which has gone so far as to sanction the position contended for by the plaintiff. When the plaintiff seeks to recover upon the sole ground of prior possession, a clear and unequivocal possession should be proved. (*Jackson ex dem. Ludlow* v. *Myers*, 3 *J. R.* 387.) In *Jackson* v. *Schoonmaker*, (2 *J. R.* 230,) it was held that a possession fence, made by felling trees and lapping them one upon another round the land, was insufficient to support an adverse possession. "This mode of taking possession," says KENT, Ch. J., in that case, "is too loose and equivocal. There "must be a real and substantial inclosure, an actual occu- "pancy, a *possessio pedis*, which is *definite*, *positive and noto- "rious*, to constitute an adverse possession, when that is the "only defense, and is to countervail a legal title." If that was an insufficient possession to sustain a defense of adverse possession, much more would it have been insufficient to sustain an action, and in that case the facts to constitute possession were at least as strong as they are in the present case. The case of *Jackson* v. *Schoonmaker*, (4 *J. R.* 390,) is of a similar character

to the case last cited. In this case also the lapping of trees to form a fence for the purpose of taking possession was held to be insufficient. In both of the cases last cited, the defendants went upon the land for the purpose of taking possession, and, while upon it, they performed acts much more indicative of the fact of taking and holding possession than were the acts of the plaintiff in this case. I think that his acts were too loose and equivocal to support a claim of possession. There was no real and substantial inclosure, no actual occupancy, no *possessio pedis*, definite, positive and notorious, of which Kent speaks as being necessary to enable a party to make out a title by possession.

It would, indeed, be an unfortunate state of things, if a person in the actual possession of land, having entered without violence and in good faith and under a title, which to say the least is equally good with that under which his adversary claims, could, after having made valuable improvements on the premises, be thrust out of possession upon such loose and indefinite acts as are those upon which the plaintiff relies. Were that so, then indeed would there be no security to the possessions of most of the people of the city of San Francisco. Any man would be liable to be deprived not only of the land which he possesses in good faith, but also of dwelling-houses, stores; buildings, and other substantial improvements, which he may have erected at enormous expense. Nay, the plaintiff himself, if put into possession, would not be secure; for, upon the same ground on which he should recover, the person who built the fence along the line of this lot, might come forward and claim that he also was in possession prior to the plaintiff, and oust him also; and thus, a series of suits brought against persons in possession having no title, by persons out of possession having no title, might be prosecuted and sustained indefinitely, and the whole community thereby set afloat upon a sea of uncertainty, confusion and litigation which would have no bounds. As for myself so far as I legally may, I am determined to protect the actual possessor, until some person can oust him by virtue of superior title. This is reasonable; this is common law; and

it is indispensably necessary that the rule should be applied and enforced in the existing condition of things in this state. My opinion is that the judgment should be reversed with costs.

Ordered accordingly.

HASTINGS, Ch. J. (dissenting.) The respondent who was plaintiff, instituted proceedings before the late court of First Instance, to recover possession of a certain parcel of land situated in the city of San Francisco, being one hundred *varas* square, and known as lot No. 22 upon the map or plan of the city. The respondent avers in his complaint that the defendants unlawfully entered upon, and despoiled him, the plaintiff, of his possession of a portion of said lot, on the 26th day of Feb. A. D. 1850. The respondent represents that prior to, and since, the 15th day of April A. D. 1847, he has been the owner in fee, by a full and absolute title of said lot, and prays to be restored to the possession of that portion of the same of which he has been so despoiled, &c.

The defendants answered, 1st. That plaintiff was not the owner in fee of said premises. 2d. That defendants did not unlawfully enter upon said premises. 3d. That plaintiff is not entitled to possession, nor has plaintiff been despoiled of any part or portion of his possession as is in his complaint alleged. The respondent introduced a deed from the Alcalde of San Francisco, which was executed in answer to a petition representing among other things, that the petitioner was by the proclamation of Commodore R. F. Stockton, a citizen of California, and a resident of the town of San Francisco.

The deed was executed on the 15th day of April A. D. 1847, and signed "Edwin Bryant, chief magistrate." In the deed he is described as the Alcalde of San Francisco, and uses in the grant the usual term of conveyance in a deed transferring the title in fee. The introduction of the deed was followed by proof of the official character of the grantor, and testimony that in June 1848, the plaintiff took possession of and "staked the lot out," and cleared the foundation for the erection of a house.

That also the lot was fenced, in the summer of 1848 in part. The plaintiff also introduced an ordinance of the town council of San Francisco by which it is declared, "that all conditions "in Alcaldes' deeds to lots in San Francisco, are removed and "abrogated, and that no lot of land in said town or its suburbs "shall hereafter be forfeited in consequence of the grantee or "owner failing to fence or build upon the same according to "the conditions heretofore attached to titles or deeds," which ordinance "passed Sept. 28th,1848." The defendants introduced testimony tending to prove that at the time of defendants' entry "there were no marks of the premises ever having been im-"proved or cultivated before defendants commenced their im-"provements." One of the witnesses testifying that "the land "was in a wild state," and "no *marks* on the premises except "the old survey stakes."

The defendants claimed title and a right to possess under a deed executed by one Joseph F. Atwill, in which deed is a recital that he derived title "from the justice of the peace G. Q. "Colton, Esq.," by grant bearing date the 21st day of December A.D. 1849.

The court rendered a judgment for the plaintiff and awarded a writ of possession.

This case must be disposed of according to the laws in force at the time when the action was commenced, and in passing upon the rights of the parties, it is important to examine the forms of proceedings and the remedies afforded by the Mexican laws, which were imperfectly understood and inefficiently enforced, not only before, but subsequent to the conquest and acquisition of California by the United States. The action, it is argued, is in the nature of ejectment at common law, and that the plaintiff is bound to a compliance with the rules of evidence required to sustain such an action, and must recover, not on the weakness of the defendants' title, but on the strength of his own; and because he has averred in his complaint that he is the owner in fee of the premises, he is compelled to prove such title before he can recover—that having introduced his deed the presumption in favor of title in the plaintiff is waived.

Whether the plaintiff could or could not recover in this form of action at common law, need not here be questioned, as we are to look to the Mexican system of jurisprudence for a definition of the remedy adopted, and the law regulating such proceedings. Until the passage of the act adopting the common law by the legislature, the Spanish law was in force, unless so far as it was repugnant to the Republican institutions of Mexico or had been expressly altered by statute. To that extent it was the law of California, up to the time of the acquisition of the country by the United States. (1 *Alvarez*, 16; 5 *Col. Dec.* 1; 1 *Febrero Mexicano*, 27.) And that acquisition effected no change in the law regulating the rights or relations of individuals. (*Hal. Dig.* 200, 461; *Vattel* 3; 1 *Pet. Rep.*. 57, 542; 6 *Pet.* 691; 7 *Pet.* 51; 9 *Pet.* 117; 10 *Pet.* 326; 12 *Pet.* 410.) The plaintiff evidently intended to adopt a speedy and effectual remedy to recover possession of the premises, instituting in substance one of the possessory actions styled interdicts, maintained for the recovery of those things whose ownership had not been determined by a judgment. He did not set up title for the purpose of *acquiring* possession which he had never enjoyed, but the recovery of a possession of which he had been despoiled. The action is therefore not the petitory. (*Juicio petitorio.*) The Spanish law recognizes a broad distinction between suits claiming possession and those claiming property. And when the action is brought to recover the possession, the right to the possession must be determined before the right to the property. (*Dic. de Esc.*, "*Juicio petitorio;*" 1 *Febrero Tapia*, 229.)

The interdicts or possessory actions are divided into summary and plenary, calling those plenary which follow the form of an ordinary suit, and summary, those which are decided briefly without observing the usual solemnities and without admitting an appeal, or if admitted, only in the *devolutive* effect. (7 *Febrero Tapia*, *tit.* 9, *c.* 1.)

The interdicts to acquire, retain, and recover possession (*sec.* 13, *Febrero*, *above cited*) are of the greatest use and importance. The interdict for the *recovery* of possession being the most

favored by the law, it being of special importance to society that no person shall be disturbed without just cause in the possession which he has. (*sec.* 8, *same reference.*) If the plaintiff had not the title in fee, but was in possession, his action is in the nature of this favored interdict, and in the plenary, and not summary form of such an action; but if he had the absolute title as averred in the complaint, and not the possession, then he seeks to acquire the possession, and must prove his title before he can recover. In this case, the grievance complained of is not that plaintiff is the owner in fee, and that defendants refuse possession, but that defendants have *despoiled* the plaintiff of his *possession*, peaceably and previously established in him, and quietly enjoyed until the entry of defendants. It is immaterial, therefore, whether the plaintiff proved and established a good title or not, as claimed in his complaint. If he proved the prior peaceable occupancy and the subsequent disturbance and interruption by the defendants (provided such occupancy has been in good faith) he has a right to recover. There is no evidence of the absolute ownership in the plaintiff. The source of title seems to be the town or village of San Francisco through an officer who represents himself as the chief magistrate of the district, and who claims the right to alienate such property by virtue of his office. Whether he possessed such right is not material in the investigation of this case. Nor is it a matter of any moment in this action, whether the deed which he executed be valid or not. It is not contended for the respondent that he has the absolute title. There is nothing in this record which will sustain the averment in the complaint, that he is the absolute owner in fee. The plaintiff, therefore, if he recover at all, must succeed upon his proof of possession, and it may not be improper here to remark that few if any perfect titles are found in countries ceded to the United States by either France or Spain, when tested by the common law. They are considered inchoate titles, which, however, will be protected by the courts, the land being in possession of the claimant.

It therefore becomes important to examine the different kinds of possession protected by the law under the Mexican system,

in order to ascertain whether the respondent enjoyed that kind of possession which will be protected against intruders and trespassers.

In the *Diccionario de Escriche*, (*Title* "*Posesion*,") "It is "said to be of two kinds, viz., possession in fact, and possession "in fact and by the will; in fact, when one holds a thing with- "out any intention of acquiring it, as bailees, lessees, &c., &c., "but possession in fact and by the will is the holding which a "man has of things corporeal, with the aid of the body and "the understanding. And this possession is divided into na- "tural and civil. Civil possession is that which consists in "holding a thing habitually or mentally, as when one goes out "of his house or estate without any intention to abandon it. "It may also be said that natural possession is holding a thing "with intention to keep it, although we know that it belongs "to another."

"In the same manner it may be said that civil possession is "the holding of a thing with the intention to keep it, believing "that it is one's property, although in reality it is not so, as in "the case of the possessor in good faith. The true possession "is the union of the natural and civil possession which follows "from a just title; that is, a title fit (*apt*) to transfer the pro- "perty." This is the definition of the law when it defines it, "the lawful holding which a man has in things corporeal with "the aid of the body and the understanding." These species of possession are similarly defined in the civil code of Louisiana, (516, *chap.* 2*d of* "*Possession*.") Under the Spanish law, as in Louisiana, a mere civil possession is sufficient, but the possessor must hold in good faith, and by virtue of title, translative of property. Without these qualities one who holds property holds it *precariously*. (1 *Febrero Tapia*, 229, 231, 230; 7*th*, *same author*, 32; *Ordenanzas de Tierras y Aguas*, 12, 13, 17, 18.) A possessor in good faith is one who by a just title, as by purchase, &c., has acquired anything of which he believes himself master, and that he has the right to convey it. (*Esc. Dic.* 541; 1 *Febrero Tapia*, 232.)

The plaintiff therefore to recover must prove, 1st, a *just title;*

not a legal title, but a title from one who believed himself to possess the right to convey.

2d. Possession taken under such title before defendants' entry.

Not only the good faith of the plaintiff's possession depends upon the question of *just* or colorable title, but the extent of his possession; as without a title, or deed, fixing limits, he would be in possession only of so much land as he actually occupied. What is sufficient to constitute colorable claim to title at common law, seems to have been differently decided in the courts, but such a title is clearly defined in the Spanish law: "By title is understood any cause capable of transferring "the dominion, such as donation, sale, &c., &c., of course. But "title need not be complete or perfect, for in that event protec-"tion, by the lapse of time, would be unnecessary. (*Ord. de* "*Tierras y Aguas*, 10, 11; 3 *Part. Tit.* 29, *c.* 18; *Esc. Dic.* 542.)

"To enable the party to prescribe good faith, a reasonable "belief that he has a title which will be the cause of vesting "in him the absolute property, seems to be sufficient.

"Title colorable is that which is founded in any appearance "of reason and justice; that which has the appearance of good "faith, but which is not sufficient of itself alone, to transfer the "property without the aid of possession and presumption." (*Diccionario de Escriche*, *Title* "*Posesion*.")

Has the respondent then such a sufficient title as to constitute his possession, taken in June, 1848, of the premises in controversy, a possession in good faith, and such as lapse of time will ripen into absolute title in fee? He has a deed executed in the usual form of a deed of conveyance, by a grantor who assumed the right to convey, a right which the respondent found to exist in officers of similar name and jurisdiction in the different *Pueblos* in this country. The grantor did not assume to be the owner himself, but to act for and in behalf of the owners, authorized by the municipal regulations of the town. A municipal government was organized under a town council, and an Alcalde. Lots had been surveyed and were then in the possession and under the control

of the town authorities, and were offered for sale. Whether the title to the lots was in the Mexican government or the people of San Francisco, and what regulations had been made by the Departmental Government of California for the alienation of these lots, the plaintiff was not bound to know.

Instructions from the Departmental Government, or orders and decrees of the governor relative to the disposal of municipal or public lands, are not of the nature of general law. We cannot reasonably doubt that the plaintiff, under all the circumstances with which he was surrounded, believed he had purchased of one having authority to convey. The grantor claimed to be the Alcalde and chief magistrate of the town or district of San Francisco. His deed, upon its face, is an official paper. The officer's authority to convey was generally recognized, and it is not usual, nor to be supposed, that a purchaser will so closely scrutinize the right of an officer to sell and convey property as an official act, as that of a vendor who claims title in himself, and who alone is to be benefited by the sale. In addition to the usual solemnities required to pass title to real estate, an official deed has added to it the apparent sanction of the law. In this the then chief judicial officer of the town, whose duty it was to understand the law, and declare the same, may have assumed an authority which he had no right to exercise. He and the officer from whom he derived his commission may have violated law when they took into their own hands, either municipal or national property, and alienated the same, directly or indirectly, or in any manner.

Yet, though there was no such authority vested in this officer, his conveyances being in the usual form, and fit to transfer a title, an adverse possession under such a deed for the time the law requires will grow into sufficient title to prevail against the true owner, provided the title be not in the government, of which we have no evidence in this case. Such is not only the Spanish and Mexican law, but the French and Louisiana law is the same; and so it may be said is the common law, for it is conceded that a deed from any person, though he have no title, executed in the usual form, is colorable evidence of title at com-

mon law, and good in adverse possession. Even a sheriff's deed, without a seal—an instrument void upon its face—has been holden to be a colorable claim of title sufficient in adverse possession. (*Jackson* v. *Newton*, 18 *Johnson's Rep.* 255; *also Northorp* v. *Wright*, 7 *Hill's Rep.* 468–9.)

In the case of *La Frambois* v. *Jackson*, (8 *Cowen*, 589,) in the court of errors, in considering the sufficiency of defective title papers, in adverse possession, as against the true owner, Chancellor Jones says: "These documents may be slender evi-"dence of title; but the question is whether this documentary "evidence, slender as it is, is not sufficient to give a character "of adverse possession to the occupancy of La Frambois under "it, and to rescue him from the reputation of being a mere "trespasser. It is not necessary to constitute an adverse pos-"session, that it should have commenced under an *effectual deed.* "If the possessor claims under written evidence of title, and "on producing that evidence it proves to be defective, the "character of his possession as adverse is not affected by the "defects of his title. If the entry is under color of title, the "possession will be adverse, however groundless the supposed "title may be. The fact of possession and its character, and "the *quo animo* of the possessor, are the test."

Spencer, senator, in the same case, says, "the authorities be-"fore cited show that it is wholly immaterial whether the title "claimed be rightful or not; it is sufficient if there be a claim "of some title. The very idea of an adverse possession admits "a hostile rightful title."

Another senator, also with the majority, says, "But it is said "that he was bound to know that a title derived from the "French government was invalid, and that it affords him, there-"fore, no color of title. The effect of this reasoning is to place "a person who enters under a claim of title, which he may in "good faith believe to be a good one, in a worse situation than "one who enters with no title at all. I apprehend a person en-"tering on lands without any title or under defective title, is as "much bound to know that, by the law of the land, he has no "good title, as one who enters under a French grant."

Applying this reasoning to the case at bar, the respondent is not bound to know that the Alcalde had no authority to convey the premises. The maxim that every citizen is presumed to know the law and can take no advantage of his ignorance thereof, does not hold in prescription in the Spanish or adverse possession in the common law. If so, this means of acquiring title would cease to exist in most cases, and the decision of the court in the case of *Jackson* v. *Newton*, before cited, would be erroneous.

The respondent, then, having a title sufficient in prescription, it is only necessary that he should have had the possession, either natural (*actual*) or civil. (*See the cases of Bernard* v. *Shaw*, 9 *M. R.* 79; *Mayfield* v. *Morris*, 10 *L. R.* 442; *McDonough* v. *Childress*, 15 *L. R.* 561.) And such is the Spanish and French law. It will hardly be contended that he had not, at least, the civil possession at the time of defendants' entry. He had entered under claim of title, cleared the ground for the foundation of a house, had stakes at the corners of his premises which were prominent and visible at the time of defendants' entry. The lot had been in part at least enclosed by a fence, and although the respondent was not actually occupying at the time, there is no evidence that he had abandoned his possession. It is said the fences had been destroyed, and the lot appeared in an unoccupied state. So the premises of any possessor may be made to appearance, by trespassing upon and destroying improvements.

A false opinion seems to prevail as to the necessity of an actual enclosure as a fence, in order to acquire possession of lands. I think the law to be, that any improvements or monuments *visible and prominent*, indicate a claim of title or possession, and he who enters on such land has notice thereof, and gains no greater right by his entry than he would acquire if the premises had been enclosed by a fence. Upon the question of the necessity of actual residence on land, or a *pedis possessio*, Judge Story in the case of *Ellicott & Meredith* v. *Pearl*, says, "Nothing can be more clear than that a fence is not indispen-"sable to constitute possession of a tract of land. The erection

" of a fence is nothing more than presumption of an intention " to assert an ownership and possession over the property. But " there are many other acts which are equally evincive of such " an intention of asserting such ownership and possession ; such " as entering upon land and making improvements thereon, rais- " ing a crop of corn, felling and selling the trees thereon, and un- " der color of title. An entry into possession of a tract of land " under a deed containing specific metes and bounds, gives a " constructive possession of the whole tract, if not in any ad- " verse possession ; although there may be no fence or enclosure " round the ambit of the tract, and an actual residence only on " a part of it."

The case of *Jackson* v. *Schoonmaker*, (2 *J. R.* 230,) is cited and relied upon as conclusive against the respondent. It is only necessary to read one extract from the opinion in that case to show that if it had not already been overruled it should have been :—" There must be," say the court, " a substantial enclo- " sure," and " that a possession fence made by felling trees and " lapping them one upon another round the land, was insufficient " to support an adverse possession." But this is an overruled case. It has been substantially overruled by the New York courts, who for years since hold a very different doctrine. And it is sufficient, perhaps, to refer to the case of *Ellicott and Meredith* v. *Pearl*, above cited, in which the supreme court of the United States utter a very different and contrary decision. And so in many other cases which may be cited from that court, as in the case of *Ewing* v. *Burnet*, (11 *Pet.* 52,) in which Mr. Justice Baldwin, in delivering the opinion of the court, says, " It is well settled that to constitute an adverse possession " there need not be a fence, building or other improvement " made.

" It suffices for this purpose that visible and notorious acts of " ownership are exercised over the premises in controversy for " twenty-one years after an entry, under claim and color of " title." " Neither actual occupation, cultivation or residence " are necessary to constitute actual possession, when the proper-

"ty is so situated as not to admit of any permanent useful im-"provement." (*See, also, Watkins* v. *Holman et al.* 16 *Pet.* 54.)

The respondent having, in good faith, purchased and taken possession, although he may have acquired no valid title, the defendants having entered as a naked intruder and trespasser against the true owner or by virtue of a similar right, subsequently acquired, I believe at the time of defendants' entry the respondent had the superior right to the possession of the premises.

I think, therefore, the judgment of the court below should be affirmed.

REYNOLDS *vs.* WEST.

The decision in *Woodworth* v. *Fulton*, that a grant of lands in San Francisco, made by an American Alcalde, during the continuance of the war between the United States and Mexico, is void, approved.

A grant by a Mexican officer duly authorized, and made in accordance with the Mexican laws applicable to California, and before the acquisition of the country by the Americans, is a title protected by the law of nations, as well as by the treaty of Querétaro, and cannot be disturbed.

An inchoate title to lands is property, which is protected by the treaty of Querétaro, and cannot be affected or questioned by any authority except the government of the United States. *Per* BENNETT, J.

15 How. R. 8 A grant of land made by a Mexican Alcalde before the war, will be *presumed* to have been made in the course of his ordinary and accustomed duties, and within the scope of his legitimate authority; and the burden of proof lies on him who controverts the validity of such a grant, to show that it is not made by a competent officer, or in the forms prescribed by law. 1856

It *seems*, that Mexican Justices of the Peace had authority, before the war, to make grants of land in San Francisco.

Where a petition for a grant of land was presented to an Alcalde without the signature of the petitioner, but the prayer of the petition was granted by a writing immediately following the petition; *Held*, that the grant was valid, notwithstanding the want of the petitioner's signature.

Where the grantee was a married woman; *Held*, that the question as to her capacity to take a *concession* of public lands, was a question for the Alcalde, in the performance of his official duties to determine, or that, at least, the legality of the *concession* would be presumed until her incapacity to take according to law should be established by the party denying it.

Where it appeared that the petitioner's husband was the owner of two fifty *vara* lots at the time the *concession* was made to her; *Held*, that it would be presumed that the act of the Alcalde in making the grant was in conformity with law, until it should be shown that the petitioner's husband had received the lots which he held, as a *concession* of public lands, and not by purchase from an individual.

Where the boundaries of a lot of land granted by an Alcalde were uncertain; *Held*, that the true location of the lot was a question of fact for the jury to determine.

What is termed the "swinging of lots," a measure adopted in pursuance of a resolution of a public meeting in San Francisco, cannot change the location of premises actually granted, or impair the right of the grantee therein. The taking of a part of a lot from an individual for the purpose of a public street, though it may, perhaps, give him a claim on the public for compensation, does not confer upon him the right to encroach to the same extent on the land of his neighbor.

Appeal from the court of First Instance of the district of San Francisco. Judgment was rendered in the court below in favor of the plaintiff, and the defendant appeals. The facts are stated in the opinion of the court.

Calhoun Benham and *Mr. Merrill*, for plaintiff.

Edward Norton, for defendant.

By the Court, Bennett, J. On the 9th day of April, 1845, one Rosalia Haro presented a petition to Juan N. Padilla, the Alcalde of the Jurisdiction of San Francisco, in the following words, according to the translation in the record:—

"Fifth Seal,—One shilling. Provisionally used by the custom house of the port of Monterey, in the department of California, for the years one thousand eight hundred and forty-four and five.

"Micheltoreno. "Pablo De La Guerra,
"in the absence of
"Don Guillermo Ed. Hartnell.

"Señor Alcalde of San Francisco:—Rosalia Haro, a Mexican citizen, and located in Yerba Buena, requiring a lot to place thereon an orchard, comes now before you in due form and showeth: That in order to carry out her

"object she asks possession of lot number one hundred "and seventy-four, which is now vacant, on the plan of "Yerba Buena; which I beg you will deign to grant, and "for which you shall receive thanks—I swearing that it is not "through fraud, but for necessity.

"Yerba Buena,
"April 9th, 1845."

The above petition was not signed. Immediately following it was a grant by Juan N. Padilla in these words:—

"Having seen the foregoing representation, and by virtue of "the superior decree of the Departmental Government, I, Juan "N. Padilla, First Alcalde of this Jurisdiction, do give unto "Rosalia Haro, legal and perpetual possession of lot number "one hundred and seventy-four on the plan of Yerba Buena, "said lot being fifty *varas* square, and under the following "conditions:

"1st. That within the precise term of one year from this "date the lot shall be fenced in and a house built thereon.

"2d. The regulations of police established and to be established shall be regarded.

"3d. Failing to observe the first condition, the interested "party shall lose her right to the lot—and failing to observe "the second, shall be punished according to law.

"In order to serve as a title, I give this in Yerba Buena, this "9th day of April, 1845, record having been made of the same "in the proper register.

(Signed) "JUAN N. PADILLA.

"Witnesses—William Hinckley, Francis Haro.

"Municipal fees $15 $\frac{63}{100}$."

At the time the above grant was made, Rosalia Haro was a married woman, and she and her husband, A. A. Andrews, were living on another lot. Andrews and his wife had two other lots at the time this grant was made, but whether they were lots granted to them by the public authorities, or lots

which they had acquired by purchase from private individuals, does not appear. Rosalia Haro had a small house built on the lot granted to her, and a fence made around it, and she cultivated it as a garden; and Andrews caused a well to be dug about the middle of it. Andrews testifies that his houses and fences were burnt down during the war.

Juan N. Padilla, the Alcalde who made the grant, was examined as a witness on the part of the plaintiff, and testified that the grant was made at the time it purports to have been made—that it was genuine and made in good faith, and according to the forms of law and the customs of the country, and that he put Rosalia Haro in possession of the lot.

Francisco Guerrero, another witness for the plaintiff, testified that the Alcalde ought not to have made the grant without the petition having been signed, but that, in other respects, it was in accordance with the law and the customs of the country.

In 1847 Andrews moved from San Francisco to a ranch at the Red-woods, about eight leagues off.

The plaintiff claims through several conveyances from Andrews, and his wife Rosalia Haro.

The defendant claims, under a grant from an American Alcalde, made on the 17th day of March, 1847, title to a lot designated as lot number 174.

We decided in *Woodworth* v. *Fulton et al.*, (*ante, p.* 295,) that a grant from an American Alcalde, made during the continuance of the war between the United States and Mexico, was a nullity. We entertain no doubt about the correctness of that decision, and we shall adhere to it. The claim of title by the defendant in this case may, therefore, be dismissed from further consideration.

The question is entirely upon the title of the plaintiff. Was the grant made in accordance with the Mexican laws applicable to California? If so, we think it is a title which cannot be disturbed. By articles eight and nine of the Treaty of Querétaro full guaranties are given for the protection and free enjoyment of private property by Mexican citizens; and the right to this would have been sacred, independent of the treaty. (*Delassus*

v. *The United States*, 9 *Pet.* 117; *United States* v. *Perchman*, 7 *Pet.* 51.) The sovereign who acquires an inhabited country, acquires full dominion over it; but this dominion is never supposed to divest the vested rights of individuals to property, and an inchoate title to lands is property. (*Id. ibid; Smith* v. *United States*, 10 *Pet.* 326; *Soulard* v. *United States*, 4 *Pet.* 511.)

The grant by the Alcalde in this case was, according to the testimony of Guerrero and Padilla, made in accordance with the law and the customs of the country; and custom and usage, when once settled, are equivalent to law, though they may be comparatively of recent date. (*Strother* v. *Lucas*, 12 *Pet.* 410.) The presumption is in favor of the validity of every grant issued in the forms prescribed by law; and it is incumbent on him who controverts, to support his objections. The burden of proof lies on him. (*Patterson* v. *Jenks et al.*, 2 *Pet.* 216.) It is settled by the decisions of the supreme court of the United States, that a grant, or *concession*, made by an officer under a foreign government, in the course of his ordinary or accustomed duties, creates a legal presumption that he acts within the sphere of his duties, until proof is made by those who deny, that such power does not exist. (*Strother* v. *Lucas*, 12 *Pet.* 410, 437; *United States* v. *Arredondo et al.*, 6 *Pet.* 691.) In the case of Arredondo, it was decided that fraud cannot be presumed, but must be proved, and that the signature of an officer in his official character will always be received, upon the principle that public functionaries are supposed to act with legitimate, and not usurped functions.

It strikes us that, according to the decisions above cited, the sole question touching the validity of the plaintiff's title, is the power of the Alcalde to convey. It would seem, from an instruction of the Prefect to the justice of the peace of San Francisco, under date of April 23, 1841, and recorded in Book B. of Spanish records of San Francisco, that the power of conveying lots in that *jurisdiction* was vested in the justice of the peace. The following is a close translation of that instruction:—

"PREFECTURE OF THE FIRST DISTRICT.

"The secretary of the despatch of government of this depart-"ment, under date of the 16th instant, communicates to me "what I now copy.

"When the Señor Prefect Don José Castro made a visit to "the North, he took instructions with him from the government "on various subjects, and amongst them it was ordained, that "lots could be granted to private individuals in the establish-"ment of *Dolores*, but that they should not exceed the quantity "of fifty *varas*. That was the order, and now it is renewed; "his excellency having seen the note that this Prefecture direct-"ed to this *Bureau* the 6th of the present month; and his ex-"cellency orders me to inform the justice of the peace of San "Francisco, that in the granting of lots, it should be done in due "order, and under the best regulations possible, as the locality "of the place may require, so that the streets and public squares "be not interfered with, and from the start have a just relation "and correctness.

"I communicate this to you for your intelligence and fulfil-"ment, and as the result of his communication treating on the "subject.

"God and Liberty.

"Señor (Signed,) "SAN JUAN DE CASTRO.
Justice of the Peace of San Francisco. (Signed,) "JOSÉ T. CASTRO.
"April 23, 1841."

From the above document the power to make grants or *concessions* of land, not exceeding fifty *varas*, seems to be expressly recognized in the justice of the peace of San Francisco, but there is nothing contained therein limiting the exercise of such power to the justice of the peace, or prohibiting Alcaldes from making grants with the same force and effect as a justice of the peace; and, according to the above cited decisions of the supreme court of the United States, such authority is to be presumed until the party denying it proves that it did not exist.

We must, therefore, hold that the grant in this case was made by a competent officer.

We think the objection that the petition was not signed by Rosalia Haro, is untenable. According to the recital in the grant, the petition must be considered as having been presented by her to the Alcalde, and the grant having been made to her in pursuance of the prayer of the petition, we think that the want of her signature does not affect the validity of the subsequent grant.

The position of the appellant, that the decree of the Departmental Government by virtue of which the Alcalde assumed to make the grant, ought to have been produced and proved, we also consider untenable, under the decisions above cited.

But it is objected that the petitioner was a married woman, and was, therefore, incapable of taking a *concession* of public land. But that question was one for the officer, in the performance of his official duties, to determine, or if not, it was for the party denying the capacity to take, to establish. The same answer applies to the objection, that the petitioner's husband was the owner of two other lots at the time this grant was made. To make the objection valid, we apprehend that it should be shown that these two other lots were held under a grant from an officer of the government, and not by purchase from an individual.

The conditions annexed to the grant appear to have been complied with, and no question can arise as to the validity of the plaintiff's title upon this ground.

Our conclusion is, that the grant was valid, and transferred to the grantee a right and interest in lot 174 on the then plan of Yerba Buena, which is protected by the treaty of Querétaro, and which would have been equally protected under the law of nations, without any treaty stipulations.

The only remaining question is as to the location of this lot 174. The grant conveyed to Rosalia Haro a right to that definite portion of land known as lot No. 174 on the plan of Yerba Buena, and to no other lot or portion of land. The testimony is somewhat conflicting on this point, but the weight of it is, in our

opinion, against the position that the land claimed by the defendant is any portion of lot 174, granted to Rosalia Haro. This is a question which we think is peculiarly proper for the determination of a jury, and a new trial should be awarded, for the purpose of ascertaining, with greater certainty, the position of the lot claimed. What is called the "swinging of lots," in pursuance of a resolution adopted at a public meeting in San Francisco, could in no respect change or vary the location of any lot, or impair the right of Rosalia Haro in the premises granted to her. If any portion of a lot owned by an individual has been taken for a public street, that may give such person a claim upon the public for compensation, but can give him no right to encroach, to the same extent, upon the land of his neighbor. Vested rights cannot be thus shifted from one person to another.

New trial ordered, costs to abide the event.

In the Matter of The "California College."

In an application for an order to incorporate a college under the act of 1850, it is necessary that subscriptions of real estate should define the boundaries or situation of the lands proposed to be given; and where an endowment of a proposed college consisted of real estate, and the situation of the lands proposed to be donated, could not be ascertained and determined from the subscription papers, the application was denied.

Query? **Whether the subscription under the act must not be a *cash* subscription.**

This was an application for the incorporation of a college. The statute required an *endowment* of $20,000, and the subscriptions, by reason of which the charter was asked, consisted almost entirely of lands; but they were not sufficiently definite to enable any one to locate the lands.

Frederick Billings, for the application.

By the Court, Bennett, J. This application is made under an act of the legislature of which the first three sections are as follows: "Section 1. Any college may be incorporated in this "state according to the provisions of this act by the supreme "court of the state upon application. Section 2. The founders "or contributors of any proposed college within this state shall "make to the supreme court an application in writing under "their hands, requesting that ——— College may be incorpo- "rated, specifying the first trustees and the name by which the "corporation is to be called. Section 3. In case the court "shall be satisfied that the proposed college has an endowment "of twenty thousand dollars, and that the proposed trustees are "capable men, then the court shall, by an instrument under its "seal, declare the college incorporated under the provisions of "this act, by the name specified in the application, and the ap- "plication together with the declaration of the court shall be "recorded in the office of the secretary of state."

The application in this case must be refused. To say nothing of the serious doubts entertained, whether the endowment mentioned in the third section, should not be a *cash* endowment, we are not satisfied that the proposed college has an endowment in cash, in real estate, or otherwise, to the amount required by the statute. A very small proportion of the subscription is of cash. By far the greater part is of real estate; and we have no evidence that the subscribers have any title to the lots they have subscribed. The most serious objection, however, to the application is, that the persons who have come forward so liberally to forward the cause of education in this state, have neglected to designate in their subscriptions the particular description of the lands which they are willing to bestow upon the contemplated institution. Thus, there are some subscriptions of village lots in San Josó and Alviso, without any designation of the numbers of the lots, of their natural boundaries, of their natural monuments, or other marks, by which it may be determined where they are situated, and whether the land is worth five dollars or five hundred dollars. It is true that there are affidavits that the lands subscribed are worth more than the amount re-

quired by the statute; but the inquiry naturally arises, how can the deponents know the value of lands, of the location of which they have no definite idea. A man subscribes a lot without any other description than that it is in the city of San Francisco. Some lots here are worth thousands of dollars; others, not worth hundreds of cents; and as no man can tell, from the subscription papers, where the intended lot is situated, so no man can fix the value of the endowment. If individuals wish to endow a college with real estate, under our statute, they should, in their subscriptions, give such a description of the village lots or farming lands, as will enable the trustees of the college to call for a specific portion of land; so that, if the subscribers refuse to give a deed, the trustees may be in a situation to compel them to execute one, not merely for *some* village lot, or *some* tract of land, but for a parcel which is ascertained and determined by the subscription.

Application denied.

Ex parte Kyle.

An attorney has no lien upon a judgment recovered by him in favor of his client, for a *quantum meruit* compensation for his services. Such lien extends only to costs given by statute.

This was an application to require a defendant, against whom judgment had been recovered, to pay to the attorney of the plaintiff a *quantum meruit* compensation for his services in conducting the suit on behalf of the plaintiff. The judgment recovered was for $7000, and the amount, which the attorney claimed, should be first paid to him out of the judgment, was $2000.

Kyle, in person.

Chipman, contra.

in default, and should suffer the consequences of a default, resulting from his own *laches*. It is admitted that if the respondent give the notice and the appellant fail to appear, the judgment may be affirmed on motion. Why not then affirm on motion of the respondent, if the appellant give the notice? He is the author of the proceedings in this court. His notice of argument is not from the respondent, it is true, but from himself, and if he fail to appear, he is doubly in default. It would seem a mere idle ceremony to require both parties to bring a cause on for argument, when, by notice of either, both might be in court. The practice of bringing on the argument of appeals was intended to be the same as the moving a cause for trial in the district courts. Section 137 of the Practice Act provides that at any time after issue either party may give notice of trial, and then, by section 152, that either party giving the notice may bring the issue to trial, &c. It does not follow that, because either party may bring the issue to trial, both parties shall give the notice, to entitle the appearing party to the trial of the issue. A fair interpretation of these rules and statute would seem to be, that if an action be instituted, and the plaintiff does not insist upon a trial, the defendant may give the notice and have the cause disposed of; and so the plaintiff shall not move the trial until he has served the defendant with notice; and, certainly, either party, failing to appear after such notice, is in default, whether the notice issue from one or the other or both parties, unless for good cause shown. We think any respondent having received the notice required, is entitled to an affirmance of the judgment. The judgment, therefore, will be affirmed in this case.

BENNETT, J. (dissenting.) Section 277 of the Practice Act provides that the hearing of appeals shall be noticed for the first day of the term by a notice of at least four days and may be noticed and brought on by either party. The twelfth rule of this court declares, that when the cause shall be called on the calendar, if the appellant shall not appear, the respondent may move for an affirmance of the judgment, and if the respondent

does not appear, the appellant may proceed in the argument *ex parte*. The appellant in this case gave the notice of argument required by the statute, but the respondent did not; the cause was called on the calendar, and the respondent moved, under the rule, for an affirmance of the judgment. His motion should be denied. The statute and rule of court should both be construed together, and the meaning of both is, that the appellant may notice the cause and bring it on, and, if the respondent fail to appear, may proceed in the argument *ex parte;* and that the respondent may notice the cause and bring it on, and, if the appellant fail to appear, may move for an affirmance of the judgment. By the statute and rule both parties are regarded as actors, so that either can, upon the performance of a certain act, that is, giving the adverse party notice of argument, have the cause called on and disposed of according to the terms of the rule. But the fact of each party being an actor and entitled to give notice of argument, precludes the respondent from moving the cause unless he has noticed it. He is in the same condition, in this respect, as if neither party had noticed the cause. The practice in bringing on the argument of appeals was intended to be the same, and is made the same by statute, as the moving a cause for trial in the district court. Section 137 of the Practice Act provides, that, at any time after issue, either party may give notice of trial; and section 152 provides that either party, *giving the notice*, may bring the issue to trial, &c. This is just as clear an expression of the will of the legislature, as if that body had said that neither party shall be in a condition to bring the issue to trial, without having first given such notice. The practice is the same in bringing on an appeal; either party may notice and bring on the cause; and if he neglect to give the notice, so plainly required by the statute, it is his own fault. The appellant, by giving notice, does not waive his right to receive notice: by performing an act required of him by the statute, he ought not to be deprived of a right given him by the statute. The practice where these cross notices are permitted or required, is perfectly well settled in conformity with the views above expressed, and I must therefore dissent from the majority of the court.

SEAMAN vs. MARIANI.

Action, for balance of an account. Defense, payment by a promissory note. Replication, that plaintiff was induced to receive the note by means of fraudulent representations. *Held*, that the case was not referable under the statute, without the written consent of both parties.

APPEAL from the district court of the fourth judicial district. The sections of the statute under which the following decision was made, are as follows:

"SEC. 163. All or any of the issues in the action, whether of "fact or of law, or both, may be referred, upon the written con-"sent of the parties.

"SEC. 164. When the parties do not consent, the court may, "upon the application of either, or of its own motion, except "when the investigation will require the decision of difficult "questions of law, direct a reference in the following cases:

"1. Where the trial of an issue of fact shall require the exam-"ination of a long account on either side, in which case the "referees may be directed to hear and decide the whole issue, or "to report upon any specific question of fact involved therein; or,

"2. Where the taking of an account shall be necessary for the "information of the court before judgment, or for carrying a "judgment or order into effect; or,

"3. Where a question of fact, other than upon the pleadings, "shall arise upon motion, or otherwise, in any stage of the "action."

By the Court, HASTINGS, Ch. J. By the record it appears that the plaintiff sued the defendant for balance of an account for work and labor done as a mechanic. The balance not being disputed, the defendant, by his plea, set up payment by a promissory note due plaintiff at four months after date, to which the plaintiff replied fraud in the execution of the note, and rendered the same to be cancelled on the trial, and insisted on judgment

for the balance of the original indebtedness. The court, without the written consent of the parties, and against the verbal consent of the plaintiff, referred the issue to a single referee. The 136th sec. chap. 10 of the Practice Act, provides that whenever there shall be an issue of fact, it must be tried by a jury, unless a jury be waived. The 136th sec. of the same act, (*chap.* 13,) among other things provides, that such an issue, if tried by referces, must be referred upon the written consent of the parties. It is evident that there was not an issue in which the court could, upon its own motion, direct a reference, as it does not appear to present either one of the three cases specified in the 164th section of same act, in which the court is authorised to order a reference to either one or more referees, without the consent of the parties. The judgment therefore of the district court will be reversed, and cause remanded for further proceedings.

Ordered accordingly.

OSBORNE *et al. vs.* ELLIOTT *et al.*

Where promises are dependent, neither party can maintain an action against the other, without showing performance, or an offer to perform. 2 Cal. R. 164

A. agreed to convey to B. a certain vessel called the *Mariposa*, and B. gave his promissory note for the consideration money, payable at a future day; *Held*, that A. being still the holder of the note, could not bring an action thereon, without showing that he had conveyed the vessel to B. or had tendered a conveyance. And *held* further, that the tender of a bill of sale executed by A. *as attorney for* C. the real owner, was neither performance nor an offer to perform.

APPEAL from the district court of the district of San Francisco. The facts are sufficiently stated in the opinions given in the case.

Mr. Robertson, for plaintiffs.

A. T. Wilson, for defendants.

By the Court, BENNETT, J. The note on which this suit is brought, having been executed at the same time and concerning the same matter as the contract set up by the defendants, must be taken as forming a part of it, and the whole must be construed together. Viewed in this light, the defendants were required, by the terms of the contract, to pay the note; and the plaintiffs, on the payment of the note, to execute and give to the defendants a good and valid title to the ship. The promises were dependent promises, and the plaintiffs cannot maintain an action without showing performance or an offer to perform. (*Topping* v. *Root*, 5 *Cow.* 404; *Johnson* v. *Wygant*, 11 *Wendell*, 49; *Slocum* v. *Dispard*, 4 *Wendell*, 615; *Lawrence* v. *Taylor*, 5 *Hill*, 107.) The contract to transfer the ship was made by the plaintiffs in their individual capacity, and not by the owners through them as their agents. They should, therefore, before bringing suit, have tendered to the defendants a good and valid title to the ship from themselves as vendors. But the very bill of sale, which one of them executed in the name of both, shows upon its face, that R. B. Forbes of Boston, Massachusetts, was the owner of the ship, and that the plaintiffs had no title; and the bill of sale is, at the same time, executed by them as principals and not as agents of Forbes. This instrument, even if it had been tendered to the defendants, would have been no offer to comply with the stipulation into which the plaintiffs had entered. Nor can it make any difference, if, as was alleged, the defendants understood, at the time when they executed the note, that the plaintiffs did not then own the ship. It might have been in contemplation, that the latter were thereafter to procure the title and thus put themselves in a position to convey, when the note should become due. Whether this be so or not, the rule of law is indisputable, that all conversations and intentions of the parties, before and at the time of making the contract, are contained in it; so that, to the written instrument alone must we look, for the purpose of collecting their meaning. It appears from that, that the plaintiffs, individually, and not as agents, bound themselves to convey. It is unnecessary to examine minutely the numerous points made on the argument,

upon exceptions taken to the decisions of the court below, inasmuch as the above view of the case disposes of them all, and shows that, if the court had charged in favor of the plaintiffs in all respects, and the jury had found a verdict accordingly, it ought to be set aside as wholly unsustained by evidence upon a material question. The passages cited by the plaintiffs' counsel from Pothier do not apply. They relate to an executed sale; and there is in this respect no difference between the civil and the common law: but here the contract was executory. The transfer of the title to the ship was not to take place until a future day, and the possession of the defendants was not that of vendees. The offer by the defendants to pay the amount of the note, is not to be regarded as a tender or an admission of their existing liability, but rather as an offer to perform their stipulations in the contract upon the performance by the plaintiffs of their part. This, although we regard it as irrelevant in their plea, is but surplusage, which the court below might have stricken out or disregarded. Judgment affirmed.

Ordered accordingly.

HASTINGS, Ch. J., (*dissenting.*) By the terms of the contract the plaintiffs were not bound to make a good and valid title to the defendants of the ship *Mariposa* until payment of the note, for the collection of which this suit was instituted. The plaintiffs were then to make the transfer, so that the consideration is concurrent and the conditions mutual. The plaintiffs were not bound to aver performance or an offer to perform before their right of action accrued: yet before the commencement of the action, they offered to perform and offered to be responsible for any defect which might exist in their power to convey and tendered bonds of indemnity with security, and no allegation of the insufficiency of such indemnity was set up by defendants. And here it may be remarked, that the evidence shows that, at the time of making the contract, the plaintiffs' power over this vessel was fully understood by defendants, and it was not until after she had made a voyage to the Sandwich Islands and her

return to the port of San Francisco that the defendants sought to cancel the contract. The defective instrument finally executed by plaintiffs transferring the vessel, does not prove their inability to execute a valid transfer. I see nothing in the record which proves that Osborne had not the power to make a legal transfer. The absence of Forbes, (the owner's) power of attorney to Russell & Co., does not prove that it was never executed. The defendants must affirmatively prove the want of title or power to transfer, as, in the case of fraud practiced in the sale of a patent right, the vendor not having title, evidence of this description should be adduced by the defendants. (*Tousey, &c.* v. *Shook*, 3 *Blackford*, 268 ; 3 *Scam.* 237.) The most that defendants pretend to establish is, that, in the papers submitted to them by plaintiffs, there did not appear a power of attorney from the owner to an intermediate party; this does not prove its non-existence. It is very natural that, in transactions of this nature by commercial men, such a paper should be with the absent intermediate party. If the defendants believed that such a paper did not exist, they could have proved the fact by the owner himself or his intermediate attorneys in fact, who are competent witnesses, as well as any other matter of defense which they might set up. There is nothing in the record which shows unfair dealing on the part of the plaintiffs, no concealment of facts or papers, nor is it alleged that there was any proved. This note was given for a good and valid consideration, viz.: the covenant of plaintiffs to make title to, and deliver possession of, the ship for a voyage to the islands; and in the absence of fraud or misrepresentation or entire failure of consideration I can conceive of no defense that could be set up against the collection of the note. The court hold the plaintiffs strictly to the terms of this contract, excluding all evidence of the knowledge of the defendants of any alleged defects in the power of one of the plaintiffs or both to make title. It is clear that, if the plaintiffs are confined to the letter of the contract, the defendants should be as strictly held to comply, on their part, and make payment. If the defendants had paid the note, Osborne could have executed the transfer in the name of Forbes,

and then the plaintiffs would have complied on their part. The opinion of the court leads to the conclusion, that the defendants having made a contract with full knowledge of all the facts, pretending no fraud or misrepresentation, had the right to rescind the same without consent of plaintiffs—then this contract is to be considered as rescinded, and if so, the defendants have a right to recover all money paid, and authorities need not be cited to show that a contract cannot be in part rescinded. It must be cancelled *in toto*, and the parties restored to their original relation to each other. The conduct of the parties estopped them from exercising the power of rescission. On the 12th day of May 1850, their attorney examined the papers and reported that a good title or transfer could not be made; on the 15th day of the same month they make a payment. In the case of *Brinley* v. *Tibbets*, (7 *Greenleaf*, 70,) the court says, a party having once been entitled to rescind a contract, because it has not been performed in a reasonable time, if he do any act which amounts to an admission of the existence of the contract, cannot afterwards elect to treat it as void; and so we may apply the same principle to this case. The defendants having once had the right to rescind, after knowledge of such right by advice of counsel, if they do an act which amounts to an admission of the contract, as they did by the payment on the 15th of May, it is out of their power to treat the contract as void. The same principle is also laid down in the case of *Lindsey* v. *Gordon*, (1 *Shepley*, 60.) The court held that plaintiffs should have tendered a good and valid title before bringing the suit. I think a readiness on the part of the plaintiffs to make the title or transfer, was sufficient. (*Chitty on Contracts*, 739, *and the cases cited in the 5th American Edition.*) The execution of the papers in the names of the plaintiffs, when they should have been executed in the name of the principal, does not prove their inability to cause the final papers of transfer to have been put in proper form, so as to have imparted to the defendants the ownership of the vessel. From a careful inspection of this record, I see no evidence to show either inability or refusal on the part of the plaintiffs to substantially comply with the con-

habeas corpus, &c. In relation to municipal courts, which are courts of record, although inferior courts according to the constitution of the state, the law is, that nothing shall be intended to be out of the jurisdiction of such courts, but that which especially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court, but that which is especially alleged. (*Beabicon* v. *Brinckerhoff*, 2 *Scam. Ill. Rep.* 273.) The above was laid down as the law in relation to the jurisdiction of the municipal court of the city of Chicago, a court which had concurrent jurisdiction with the circuit courts in all matters within the county of Cook, and whose jurisdiction was inferior thereto in senatorial limits only. The superior court of the city of San Francisco has not jurisdiction in criminal cases, but, as to civil actions, is entitled to the benefit of the intendment of law as to jurisdiction in courts of record. Is the proceeding by *quo warranto* civil or criminal? It is, in form, a criminal proceeding, though, in substance, a civil one in most cases. The sovereign is the party plaintiff, and is styled by Blackstone, (4 *Comm.* 312,) a high prerogative writ. It would seem to be, and generally is, a mixed action for the double purpose of vindicating public policy and enforcing a private remedy. (*People* v. *Richardson*, 4 *Cowen*, 102; *Commonwealth* v. *McCloskey*, 2 *Rawle*, 381, 383.) The superior court, therefore, has no jurisdiction in proceedings by *quo warranto*. Inasmuch as this disposes of the case, it will be unnecessary to express our views as to the other points which seem to have entirely absorbed the attention of the court below. The judgment, therefore, rendered in this case, will be reversed.

Ordered accordingly.

The People, ex rel. Hagan vs. King.

The case of the *People, ex rel. Hughes* v. *Gillespie*, (*ante*, *p*. 342,) confirmed.

——————, for the relator.

Edward Norton, for defendant.

By the Court, Bennett, J. In this cause a *quo warranto* was sued out of the superior court, and judgment was rendered against the defendant. We decided in the case of *The People* v. *Gillespie*, (*ante*, *p*. 342,) that the superior court had no jurisdiction over proceedings by way of *quo warranto*. That decision controls this case, and the judgment must be reversed.

Ordered accordingly.

Soulé vs. Hayward.

Section 74 of the Practice Act, which provides for the arrest of a debtor in certain cases, does not apply in the case of one *partner* sueing to recover money received by another.

A., being the owner of an invoice of goods in the city of New York, sold one half interest therein to B., with an arrangement that the latter should proceed to San Francisco, and there dispose of the same on joint account; *Held*, that this constituted a partnership between them, and that B. was not subject to arrest in an action by A. to recover a part of the proceeds of the sales.

A party will be discharged from arrest, where the process, though proper in form, has been issued in an improper case.

[illegible] for Soulé

By the Court, Bennett, J. Application for a discharge under a writ of *habeas corpus*. The defendant was arrested in a civil suit, under the first subdivision of section 74 of the Practice Act, (*Statutes of* 1850, *p*. 435,) which authorizes an arrest

"in an action for money received, or property embezzled, or "fraudulently misapplied, by a public officer, or by an attorney "or counsellor, or by an officer or agent of a corporation, in the "course of his employment as such, or by any factor, agent, "broker, or other person in a fiduciary capacity." The affidavit, upon which the order of arrest was made, charges that the plaintiff sold to the defendant one half of an invoice of merchandise, and authorized him to proceed from the city of New York, where the parties then were, to San Francisco, and dispose of the merchandise on joint account, and that the defendant accordingly proceeded to San Francisco, received the property, and sold it. The affidavit then states, that the plaintiff has frequently called upon the defendant for an account of the sale of the goods, which the defendant has positively refused, and still refuses, to render, and that the defendant, although requested, has neglected and refused, and still neglects and refuses, to pay over to the plaintiff any part of the proceeds of the sales.

Is the defendant included within any class of persons designated in the section of the statute above cited? If so, it must be upon the ground that he was the *agent* of the plaintiff, or was acting in a *fiduciary capacity*. Was he the *agent* of the plaintiff? We think not. The relation which subsisted between the plaintiff and defendant was that of partners, and not that of principal and agent; and although one partner is, for many purposes, deemed the agent of his co-partner, we think that the most natural meaning to be attached to the term *agent* in the statute, is that which limits its application to cases in which the parties stand in the relation to each other of principal and agent in the strict legal acceptation of the words.

Did the defendant act in a *fiduciary capacity?* We think not. These words have a legal signification, and are used to denote persons occupying the position of guardians, trustees, &c. But we apprehend that they are never used, in strict legal phraseology, to characterize the relation which one partner holds to another.

The case, therefore, was not one, in which the judge was au-

thorized to make an order of arrest under the 75th section of the Practice Act. (*Statutes of* 1850, *p.* 435.)

The fourth subdivision of section 20 of the *Habeas Corpus* Act, (*Stat. of* 1850, *p.* 336,) authorizes us to discharge a person under arrest, "when the process, though proper in form, has "been issued in a case not allowed by law." If we are correct in the view above taken, the present case is one in which an arrest is not allowed by law. The defendant should be discharged.

Ordered accordingly.

WHITE *vs.* LIGHTHALL *et al.*

The appellate jurisdiction of this court does not extend over judgments of inferior tribunals, from whose decisions no appellate jurisdiction has been conferred on this court by the legislature; and where a *certiorari* had been issued to a county court, and a return was made, the proceedings were dismissed for want of jurisdiction.

The principle of the case of *The People ex rel. Mulford* v. *Turner*, (*ante*, *p.* 143,) so far as relates to the appellate jurisdiction of this court, approved.

Calhoun Benham, for the application.

Horace Hawes, contra.

By the Court, BENNETT, J. This was a proceeding for forcible entry and detainer commenced before a justice of the peace. From the judgment of the justice an appeal was taken to the county court, and judgment was there rendered. An application was then made to this court for a *certiorari* to the county court, to remove the proceedings for review into this court. I entertained no doubts at the time the *certiorari* was issued, that we had no jurisdiction; but my associates having some, it was allowed to go. The question now comes up on the return to

the *certiorari*, and has been argued before us; and we are satisfied that we have no jurisdiction over the matter.

The supreme court is strictly an appellate court, having no original jurisdiction. Its appellate jurisdiction extends only to those cases in which the legislature authorizes it to entertain appeals. The legislature has conferred upon us no power to review judgments of the county court, on appeal, or in any other way. It is true that we may issue writs of *certiorari*, but only to courts from whose judgments an appeal may be taken. The county court is not one of these. The legislature has not provided any practice, by which a judgment of the county court may be reviewed by us. The constitution is sufficiently broad to authorize the legislature to make provisions for such a case, but they have not prescribed the *quo modo* in which an appeal may be taken, and we have no power to enact laws. The application should have been made to the district court.

The extent of the jurisdiction of this court was fully considered in *The People ex rel. Mulford* v. *Turner*, (*ante*, *p.* 143.) We think the principle by which the extent of our jurisdiction is to be determined, is correctly laid down in that case.

These proceedings must be dismissed for want of jurisdiction.

Ordered accordingly.

FAY *et al*. *vs*. STEAMER NEW WORLD.

A common carrier is not liable for the loss of goods entrusted to him for carriage where it is understood that he is to receive no compensation for the carriage, and where he has exercised ordinary diligence in taking care of them; in such case he is liable only as a bailee without hire.

A., a merchant of Sacramento, was in the habit of having gold dust carried gratuitously on the steamer *New World*, from that place to San Francisco, the owners of the steamer refusing to carry it for hire, or to become liable, as common carriers, in case of loss; *Held*, where a quantity of gold dust, belonging to the plaintiffs, was stolen from the steamer, without any negligence on the part of the master and officers, that the plaintiffs could not recover its value.

Whether a common carrier of *goods and passengers merely*, can be made liable in an action for refusing to carry *gold dust*: Query?

Appeal from the superior court of the city of San Francisco. This was a proceeding under the Act to provide for the collection of demands against boats and vessels, passed April 10, 1850. The superior court gave judgment in favor of the plaintiffs, from which judgment this appeal was taken. The material facts are given in the opinion of the court.

George F. Noyes, for the plaintiffs.

A. T. Wilson, for defendant.

By the Court, Lyons, J. The question presented in this case is, are the owners of the steamer *New World* liable, as common carriers, for three thousand dollars' worth of gold dust, lost under the following circumstances? Plaintiffs, on the 28th day of September, a short time before the departure of the steamer from Sacramento city, delivered to the clerk thereof a package of gold dust, containing $3000, the property of plaintiffs, and $500 belonging to other parties, to be taken to San Francisco. The steamer is used for the transportation of passengers and freight between the two cities named. It appears that the officers have always refused to receive coin, gold dust, or bullion as freight; and that, to all persons indiscriminately, as well as to these plaintiffs, the clerk has given actual notice that he would receive gold dust or money only on condition that no charge should be made and no responsibility incurred. Plaintiffs made their shipment as above, after having this notice. The vessel arrived at San Francisco at about eleven o'clock, P. M. The clerk seems to have exercised due diligence and precaution, for he locked his office and instructed the watchman to guard it. The safe was full; and the package of plaintiffs, as well as the funds of the boat, was in the office, not in the safe. The same night, the office was broken open, and all the money not so secured was stolen. It appears that plaintiffs had been in the habit of shipping their funds through certain express

offices, but had discontinued that practice from motives of economy; the *New World*, as before stated, consenting to carry valuables without charge, if the owner incurred all risk of loss. They seem to have assented to these conditions, and arranged with the clerk of the *New World* to forward by him their money packages.

Plaintiffs were used to transport their freight on this steamer from San Francisco to Sacramento; and it is contended that this is sufficient consideration for the conveyance of the valuables not specially charged for. If this had been stipulated between the parties, or if the agents of the steamer had made a distinction between those who shipped, paying freight, and those who did not, carrying the gold dust of those only of the first named class, the defendants might perhaps be liable; but the evidence shows that the clerk made no such distinction, but refused to receive gold dust from all persons indiscriminately, except upon the conditions before named, receiving no compensation, and declining all risk. Common carriers, it is true, cannot abridge their liability by notice through newspapers, or otherwise, but this case does not come within that rule. Here, there was a special contract with the clerk of the steamer, well defined and understood, that he would receive the treasure, charge nothing for its conveyance, and incur no liability in case of loss. If the conditions imposed did not suit plaintiffs, they might have declined them. But it has been urged that, being a common carrier, the boat, *as such*, was obliged by law to receive the treasure, with the responsibility that attaches to common carriers, with or without compensation. If such, indeed, were the law, and the duty of receiving freight of every character be imposed on the carrier, then, in case of refusal to comply with this obligation, an action for damages might lie. In the case at bar, the imposition of conditions was equivalent to a refusal; but whether it is the duty of a freight and passenger steamer to receive and transport property of every character which may be offered, is a question which need not be determined in this case. The defendants are sued as common car-

riers, and hence, their liability as bailees without hire is not to be examined.

Judgment reversed.

Moore vs. Reynolds et al.

Where A. was indebted to B., to secure which indebtedness the latter held the promissory notes of the former, and it was agreed that A. should give a mortgage upon real estate to secure the indebtedness, and that B. should give up and cancel the notes and waive all claim upon the personal responsibility of A.; *Held*, in an action to foreclose the mortgage, that B. was not entitled to a personal decree against A. for any balance which should remain unpaid after the sale of the mortgaged premises. But the court, not being able to see, on account of the imperfectness of the record returned, the true state of facts between the parties at the time the mortgage was given, a new trial was ordered, for the purpose of ascertaining, whether at the time of making the mortgage, it was agreed that the mortgagee should look to the mortgaged premises alone for the satisfaction of his debt, without any recourse to the personal responsibility of the mortgagor: and *held* further, that in case no such agreement was made, the mortgagee was entitled to a personal decree against the mortgagor for the balance remaining unpaid after the sale of the premises.

Appeal from the district court of the county of Sacramento. The suit was brought to foreclose a mortgage. The complaint prayed that, in case the mortgaged premises should not sell for enough to pay the sum mentioned in the mortgage, a decree might be rendered against the defendant for the balance. The defendants alleged in their answer, that, previous to giving the mortgage, the plaintiff held the promissory notes of the defendant for the amount of $2250, without any further security for the payment of that sum, and that, in consideration of the defendants' giving the mortgage to secure that sum, the plaintiff gave up and cancelled the notes, and agreed to look to the mortgaged premises alone for the satisfaction of his demand, and waive all personal claim upon the defendants. Issue was taken by the plaintiff on these allegations in the answer, and

the cause was tried before the court without a jury. A decree for the sale of the mortgaged premises was made, but the court refused to render a decree against the defendants personally for any balance which might remain unpaid, in case the premises should not sell for enough to satisfy the debt; and after the sale of the premises a balance still remained unsatisfied. Whereupon the plaintiff appealed from the decree of the district court. The section of the statute, under which it was claimed that the court should have rendered a personal decree against the defendants was as follows: "The judgment by which a mortgage "is enforced, shall be, that the property mortgaged be sold for "satisfaction of the debt; and that if the proceeds be insufficient "to pay the debt, execution shall be issued for the residue." (*Sec.* 310 *of Practice Act of* 1850.) None of the testimony, taken at the trial, was returned upon the appeal, and the court could not determine from the record what the substantial rights of the parties were, and consequently deemed the case a proper one to be remanded for a new trial under the 279th section of the Practice Act.

M. M. Zabriskie, for plaintiff.

Mr. Wynans, for defendant.

By the Court, BENNETT, J. The suit was brought to foreclose a mortgage. The bill alleges an indebtedness from the defendants to the plaintiff, to secure which the mortgage is claimed to have been given. The answer admits that the plaintiff held the notes of the defendants for the amount charged in the complaint to be due, but states that the notes were delivered up to be cancelled, at the time the mortgage was given, with an understanding that the mortgagee was to look only to the mortgaged premises, and waive all claim upon the personal responsibility of the defendants. There seems to have been no evidence given— none is returned. The judgment of the district court was, that the mortgaged premises be sold; but the court refused to give judgment for execution against the defendants, in case the

mortgaged premises should not sell for sufficient to pay the mortgage debt.

We think a new trial should be ordered, for the purpose of ascertaining, 1st. Whether the defendants were indebted to the plaintiff at the time of giving the mortgage, and if so, in what amount; and 2d. Whether, if any indebtedness existed, it was agreed, at the time of giving the mortgage, that the plaintiff should look to the mortgaged premises alone for payment. In case there was an indebtedness, and it was not cancelled as above mentioned, the plaintiff is entitled to have execution for any balance due after the sale of the premises.

Ordered accordingly.

YONGE *vs.* THE PACIFIC M. S. S. COMPANY.

In an action against a common carrier for non-performance of his contract to carry a passenger, remote and contingent damages cannot be recovered: So *held*, in a case where the plaintiff, through the violation of the agreement of the defendants, was detained at New Orleans and at Panama, on his way to California, an unreasonable length of time, and the court charged the jury that the measure of damages would be the wages at the then rates in San Francisco during the period of such detention. 2 Cal. 274

It *seems*, that evidence, showing that the plaintiff was a good bookkeeper, was proper to be submitted to the jury, to enable them to form an estimate of the damages which the plaintiff had probably sustained.

Although this court may be satisfied that the verdict of the jury is reasonable in amount, a new trial will be granted where an erroneous instruction has been given by the district judge, which may have influenced the verdict.

APPEAL from the district court of the district of San Francisco. The facts of the case, so far as they are material, will be found in the opinion of the court.

Mr. Robertson, for plaintiff.

Hall McAllister, for defendants.

cent. Halstead paid on this agreement, at various times, sums amounting in the whole to about $7000, but failed in the end to pay the whole amount, and the title to the vessel was transferred by the agent of Balch to another person. About the 1st of March, 1850, Halstead, who then had possession of the bark, contracted verbally with the plaintiff Snow, to sell to him one fourth part of the *Sacramento*, and to give him the berth of mate on the vessel on a trip to the Sandwich Islands. The plaintiff paid Halstead $2300, as part payment of the purchase money, and one witness, Francis S. Balch, testifies, that "from "conversations with Snow, witness got the conviction that Snow "knew all about the circumstances of Halstead's purchase." The only testimony, showing any representations of the defendant *before or at the time* of the above contract of sale to Snow, is that of Gould, who states, that he acted for Snow in the matter, and that Halstead "stated that he had bought the bark *Sacra-"mento*, and wished to sell part of it." It also appears that Halstead had stated to Snow and others, that he was the owner of the bark, but whether such declarations were made before, or at, or subsequent to, the sale to Snow does not appear.

The vessel made a trip to the Sandwich Islands and back, which turned out to be unprofitable. Snow went as mate on this voyage.

On the 10th day of October, after the return of the bark from the Sandwich Islands, Halstead executed a written instrument, which recites that he had bargained for and purchased the bark *Sacramento* of Balch, and that, soon after such purchase, he had made an arrangement with Snow by which the latter was to become part owner, and had agreed to purchase one quarter of the vessel, and had paid $2300, and had become part owner of the bark in the same proportion that the sum of $2300 is to the sum of $13000, and declares that when the balance of the money due for the quarter interest of Snow should be paid, then Snow would be the owner of one quarter part of the vessel. There is no evidence, either in this instrument or otherwise, that any money was paid at the time of the execution thereof, or afterwards.

The action is brought to recover back the $2300 paid by Snow, on the ground that the money was obtained by Halstead through false and fraudulent representations. The complaint, after giving a copy of the instrument of October 10th, 1850, above mentioned, proceeds as follows:—" And the said plaintiff " further says, that the said John J. Halstead has received from " him in cash the sum of two thousand and three hundred dol- " lars mentioned in the above instrument under the *representa-* " *tions contained therein*, that he was the owner of the bark " *Sacramento*, and that he had a right to sell to the plaintiff the " one quarter part of the same." The complaint further states that the plaintiff is " satisfied" that the defendant never was the owner of the bark, and that he procured the money of the plaintiff in a fraudulent and deceitful manner, and upon false and unfounded representations, &c.

It will thus be seen that the substance of the charge in the complaint is, that the defendant in the month of *March*, 1850, obtained of the plaintiff the sum of $2300, by means of false and fraudulent representations, contained in an instrument executed in the month of *October*, 1850. It is hardly necessary to say, that no action whatever can be maintained upon such grounds.

The charge in the complaint that the plaintiff is *satisfied* that the defendant never was the owner, &c., amounts to nothing. Pleadings must be construed, whenever they are ambiguous, most strongly against the pleader; and viewing the complaint in this light, the issue tendered is whether the plaintiff was *satisfied* that the defendant never was the owner, &c. This issue was immaterial, and, whether found one way or the other, could not present a point on which the cause could be decided upon the merits. At the same time, we feel clear that, had there been a distinct charge of fraudulent representations, there is no evidence to substantiate such charge.

The judgment should be reversed, and as we deem the complaint irremediably defective, there can be no use in according a new trial.

Ordered accordingly.

WALTON *vs.* MINTURN.

A defendant should set forth the true nature of his defense in his answer, and in case he does not, should not be permitted to insist upon it.

The report of a referee upon the facts of a case will be considered the same as the verdict of a jury.

THE action was brought by the plaintiff to recover compensation for attending a sale of property on behalf of the defendant. The cause was referred to a sole referee who reported in favor of the plaintiff. The defense insisted upon at the hearing before the referee was not set forth in the answer of the defendant, and, though received in evidence by the referee, appears not to have been considered by him, for that reason. The rest of the facts are stated in the opinion of the court.

————————, for plaintiff.

Allen T. Wilson, for defendant.

By the Court, LYONS, J. It is in evidence that Walton was employed by defendant to attend a government sale at Benicia, and there purchase for the latter certain merchandise, for which service he, defendant, was to pay plaintiff commissions at the rate of ten per cent. on the price.

The proposed purchases were made, and amounted to three thousand one hundred and ninety-two dollars and seventy-five cents.

Walton without consulting with defendant sold the same at an advance of eight hundred dollars, which profit was received and enjoyed by the latter, who refuses to pay the stipulated commissions, on the ground that the sale by plaintiff was unauthorised by him,—that the goods were sold at a price of about one thousand dollars less than their true value. These latter facts are shown by the evidence, but nowhere appear in the pleadings.

If the defendant is entitled at all to avail himself of this ground to defeat plaintiff's demand, he should have specially pleaded it, which has not been done. How the tortious act of the one party to a contract, after the performance of his covenant in the same, can relieve the other party from the obligation also to perform his covenants is not very clear. In the case at bar, if the agent transcended his authority in disposing of the goods bought at the instance of and for his principal, yet that principal ratified and approved the act of his agent by subsequently receiving the profits of the transaction.

The referee, before whom this cause was tried, having found the facts, his report stands as a verdict of jury.

Judgment affirmed.

GEORGE *vs.* LAW *et al.*

This court will not interfere with the verdict of a jury, where the question upon which they have passed is one solely of unliquidated damages, unless beyond doubt the verdict be unjust and oppressive; so *held*, in an action brought by a passenger against the owners of a steamer for not furnishing him with the conveniences during the voyage, which the contract of conveyance required.

The case of *Payne* v. *The Pacific M. S. S. Co.* (*ante*, *p.* 33,) approved.

It *seems*, that where a jury has passed upon a question of unliquidated damages, the court below has no right to direct the plaintiff to remit a part of the verdict. In case, however, the plaintiff does enter into a stipulation to remit part of the damages found by the jury, he will be held to his stipulation.

APPEAL from the district court of the district of San Francisco. The facts are fully stated in the opinion of the court.

Elisha Cook, for plaintiff.

E. Temple Emmett, for defendants.

By the Court, LYONS, J. Plaintiff was holder of a ticket

which entitled him to the occupancy of "Settee A. of Saloon—"Berth No. 9," for the "first voyage of the steamer *Columbus*, "from Panama in New Grenada to San Francisco." Said voyage commenced on the sixteenth day of May, 1850. It was shown on the part of the plaintiff, that he embarked on the *Columbus* on the day named, but that the ship was unprovided *that trip* with any such settee as described in the ticket, or with any other settee in that part of the vessel—that in consequence of this deficiency, and the crowded condition of the ship, she being provided with accommodation for but three hundred passengers, and there being on board about four hundred, he was obliged to sleep on deck, exposed to the weather, which at the commencement of the voyage was very inclement—owing to which his health suffered materially, and to such an extent as to render him incapable of active employment for some time after his arrival in San Francisco—that he was not supplied with such food as it is usual to furnish passengers of his class—and that owing to carelessness and neglect of duty on the part of the officers of said steamer, his baggage was damaged by water. The case was submitted to a jury who found a verdict in favor of plaintiff, and assessed the damages at one thousand dollars, for which sum judgment was rendered by the court. Defendants moved for a new trial, on the ground that the verdict gave excessive damages, and because it was contrary to law and evidence; whereupon the court made the following order:—"That said motion be sustained on defendants' paying "all costs within ten days, and provided plaintiff, by his attor-"neys, does not, within five days, enter a stipulation to make a "*remittitur* herein of five hundred dollars, in which case no "new trial to be had." The *remittitur* was agreed to by plaintiff and entered of record within the time limited by the court. Defendants then appeal.

The record discloses no refusal on the part of the judge of the court below to charge the jury on any matter submitted, nor is it assigned as error, that he charged erroneously on any point of law involved. In view of this the verdict of the jury must be considered as having settled all the facts of the case.

In the case of *Payne* v. *P. M. S. S. Co.*, (*ante*, *p.* 33,) decided at the first term of this court, we expressed our views in regard to the interference of courts with the finding of juries in a case of unliquidated damages. We then held that "a court ought never "to set aside a verdict because of excessive damages, unless, "*beyond doubt*, the verdict be unjust and oppressive,—obtained "through some undue advantage, mistake,—or in violation of "law; as upon questions so peculiarly pertaining to the powers "and investigation of the jury, it ought to be presumed that the "verdict is correct." The statute designates three causes which shall entitle parties to a new trial, vesting in the sound discretion of the court the granting thereof. The one relied on in the case at bar is that "the judgment is clearly contrary to law and "evidence." The court below seems to have been of opinion that this case came within the rule, and that "beyond doubt the "verdict was unjust and oppressive." This view appears also to have been taken by plaintiff's attorney who assented to the diminution of the judgment required by the court. It can scarcely be just ground of complaint on the part of appellants that the judgment of the court stands for but one-half the amount, for which the verdict of the jury was rendered. The respondent, if he had not acquiesced in the action of the court below by filing his *remittitur*, might, with more reason, have sought the intervention of this court to sustain the finding of the jury, but he also is precluded, for if such right existed, he has waived it by his own act.

Judgment affirmed.

KELLY *et al.* *vs.* CUNNINGHAM *et al.*

An action to recover damages for collision cannot be sustained where the injury of which the plaintiff complains has resulted from the negligence of both parties: so *held*, where a brig lying in the harbor of San Francisco in the usual track of bay and river steamers, without having any light hung out, was run into and damaged by a river steamer when entering the harbor on her usual course and with dimin-

ished speed, it appearing that there was no intentional wrong on the part of the defendants: and *held* further, that if *ordinary prudence* required the brig to show a light, the fact that it was a common *practice* in the harbor to neglect to do so, was no excuse; it appearing that the brig lay in a more dangerous situation than most of the shipping in the harbor.

A jury should make up their verdict from the facts according to the law as given to them by the court: and it *seems* that it is improper for a court to charge the jury "to take into consideration all of the facts and do equal justice between the "parties;" inasmuch as an instruction so general in its terms may mislead them. *Per* Hastings, Ch. J.

Appeal from the superior court of the city of San Francisco, where judgment was rendered in favor of the plaintiffs. The facts upon which the decision of this court was based are given in the opinion of the chief justice.

————————, for the plaintiffs.

Allen T. Wilson, for the defendants.

By the Court, Hastings, Ch. J. It appears from the testimony that on the night of the 7th of September, A.D. 1850, the brig *Caleb Curtis* was anchored in the roadstead (not in the harbor) of San Francisco, in or near the track of bay and river steamers. The steamer *Senator* from Sacramento City, on her usual course in entering the harbor, about 9 o'clock at night of the 7th, came in collision with the brig by which both vessels were damaged. This action was brought by the owners of the brig against the master and owners of the steamer for recovery of damages. The night was dark and foggy—the steamer at half her usual speed—the brig being without lights or a watch on her decks. The testimony is voluminous and in many things contradictory; but it appears from the testimony of several experienced seamen, who are not contradicted, that in the position of the brig "common prudence" and "self preservation" required lights and a watch. It is not contended that the collision was intentional, but that it occurred from a want of care and diligence on the part of the master of the steamer. The court was requested to instruct the jury "that if both parties were guilty

"of negligence the jury must find for the defendants." This the court gave with a qualification. We think the instruction should have been given as asked.

In the case of *Brownell* v. *Flagler*, (5 *Hill's Rep.* 282,) the court say, "in an action on the case where the injury of which "plaintiff complains has resulted from the negligence of both "parties, without any intentional wrong on the part of the de-"fendant, the action cannot be maintained," and a reference is there made to numerous cases in support of this principle.

The following instruction, viz.: "That if common prudence "required the *Caleb Curtis* to hang out a light, the fact that it "was a common practice in this harbor to neglect to do so, is "no excuse," should have been given without any explanation of the words "common prudence." These words have no technical meaning, and what the explanation was, does not appear. The court finally instructed the jury to "take into considera-"tion all of the case and do equal justice between the par-"ties." This, it is believed, is submitting too much to the jury. They are to pass upon the facts, the court upon the law. The jury should make up their verdict from the facts, according to the law as given by the court, and then "equal justice be-"tween the parties" will generally be the result; but if the jury are to find according to their views of equal justice, it is to be apprehended, that in many cases, prejudice and feeling may make that appear to be "equal justice" in one case, which would be iniquitous in another. This instruction tends to mislead and confuse the minds of the jury. The verdict of the jury is not sustained by the evidence. The position of the brig required for her own safety a watch and lights; for want of this reasonable and ordinary care the action should not be maintained. The judgment is therefore reversed, and case remanded.

Bernard vs. Mullot and others.

To entitle a defendant to set off a claim against the demand of the plaintiff, he must set forth in his answer the nature of the claim which he intends to set off—and where this was not done; *Held*, that the court below properly rejected evidence of the claim proposed to be set off.

Appeal from the district court of the fourth judicial district, where judgment was rendered in favor of the plaintiff. The cause was tried before the district judge without a jury. At the trial the defendants proposed to give evidence of a certain demand which they claimed to have against the plaintiff, as a set-off, or by way of reducing the amount of the plaintiff's recovery. This evidence was objected to on the ground that there was no allegation in the answer setting up such a claim, and the district judge refused to allow the set-off upon this ground, and gave judgment in favor of the plaintiff, from which the defendants appeal.

By the Court, Hastings, Ch. J. The respondent brought his action to recover the sum of $810 for services rendered by him as a clerk in the employ of the defendants. The correctness of the demand was admitted subject to a set-off of cash advanced which was allowed by the court. The defendants also claimed as an additional set-off, the balance due on certain promissory notes placed in the hands of the respondent, as their clerk, for collection, which exceeded plaintiff's demand.

The court rejected the balance claimed and rendered judgment for the plaintiff; and the only question is, whether there was error in refusing to allow the same.

The defendants' off-set should be as distinctly stated as the plaintiff's demand; this is required by the statute. In this case no accurate description of the notes was given in the answer. A recovery could not be had on the notes thus described, because the judgment would not be a bar to another action on the

same notes. The notes were given to the plaintiff as a clerk, and as such he is liable only in two events, viz.: 1st. If he has collected and refuses to pay the same; 2d. If not having collected the money, he has converted the notes and refuses to account for the same.

There is no averment in the answer of a conversion nor of the collection of the money. And for aught that appears in the answer or testimony the plaintiff was willing to account for the notes when called upon.

We think clearly there is no error in the judgment of the court, and it is therefore affirmed with costs.

PERSSE *et al. vs.* COLE.

Where this court sees clearly and beyond all doubt that the rejection of proper, or the admission of improper evidence, could in no way materially affect the result, the judgment of an inferior court will not, on that ground, be disturbed.

A. purchased of the plaintiffs in the city of New York certain merchandise, and gave his promissory note payable in six months for the purchase money. The goods were shipped for San Francisco, and, by the bill of lading as well as by the agreement of the parties, were deliverable to the order of the *shippers*; but they were were insured for and on account of A.; at the time of the purchase, he received a bill of sale, gave his note for the purchase money, and took a receipt for its payment, and the acts of the plaintiffs in New York, and of their agent in San Francisco upon the arrival of the goods there, as well as the conduct of A. indicated that all parties considered the transaction as a sale of the goods to A., subject to the right of the plaintiffs to retain possession until the payment of the note given by A.:—*Held*, in an action by the plaintiffs against the master of the vessel on which the goods were shipped, to recover the market value thereof at San Francisco, on account of his having delivered them to A. without the orders of the shippers, that the transaction between the plaintiffs and A. was a *sale*, and transferred to the latter the *property* in the goods, subject to a *lien* thereon for the *purchase money* in favor of the plaintiffs, and that the master of the vessel was liable to the plaintiffs only for the value of the plaintiffs' property in the goods with interest.

Instead of remanding a cause for a new trial, where the judgment below is erroneous, this court will so modify it as finally to settle the controversy, when the rights of the parties appear from the record to be fully ascertained.

APPEAL from the superior court of the city of San Francisco. The facts are stated in the opinion of the court.

By the Court, HASTINGS, Ch. J. The respondents, residents of New York, on the 10th day of December, 1849, sold to one Augustus Belknap twenty-six boxes of paper for the sum of $1498,63 payable by promissory note at six months. The boxes were shipped by respondents on the ship *Washington*, for San Francisco, of which the defendant Cole was master, to be delivered at San Francisco to the order of the shippers. Belknap having paid most of the freight of the *Washington*, the defendant delivered the boxes to him. The agent of the plaintiffs, to whose order the goods were ordered to be delivered, holding the bill of lading, subsequently tendered to defendant the freight and demanded the delivery of the boxes. This action was brought for the value of the goods, and a judgment was recovered for the full value thereof at the port of delivery; from which an appeal is prosecuted to this court.

Whether the court erred in allowing testimony to contradict the witness Belknap, and in finally ruling out the testimony of Belknap, is not material, inasmuch as we do not think the result would be changed by the admission of Belknap's testimony.

The facts appear to be (with or without Belknap's testimony) that the plaintiffs were not willing at the time of the sale to Belknap to give the credit without security, and therefore shipped the boxes to be delivered to their agent. The goods were insured for Belknap, and shipped on his account and for his benefit, and he was considered both by the plaintiffs and their agent as the owner, as is shown from the purchase, the execution of the note, the receipt of plaintiffs to Belknap, and the admissions and conduct of the agent after the ship's arrival at San Francisco; but it is equally clear that plaintiffs did not intend to part with possession until the note was paid.

It was a sale then to Belknap, subject to a lien on the goods for the purchase price. It is conceded that if Belknap was the owner, and plaintiffs had no property in the goods, the action could not be sustained; but it is contended that the plaintiffs

were the owners in possession, and that the master is liable on his bill of lading for the value of the goods in the market of San Francisco. We think the defendant was liable in this action, not for the value of the goods, but for the value of plaintiffs' property in them. Being the property of Belknap, subject to a lien to secure the purchase price of $1498,63, the defendant was responsible to that amount. The judgment should, therefore, be for that sum, with interest at 7 per cent. per annum from the time when the note matured. The judgment of the superior court is modified, and reduced to the sum of $1498,63, with interest at 7 per cent. per annum from the maturity of the note.

Ordered accordingly.

KENDALL *vs.* VALLEJO.

In an action brought to recover the contract price agreed to be paid for work and materials, the defendant will not be permitted to insist at the trial that the work was done in an unworkmanlike manner, unless he has set up such defense in his answer.

Where there was a special contract to build a *corral*, and it was proposed by the defendant at the trial to prove that the *corral would not answer the purpose for which it was intended*, and the district judge excluded the evidence; *Held*, that his ruling was correct, as the question between the parties was not whether the *corral would answer the purpose for which it was intended*, but whether it was built *according to the terms of the contract.*

APPEAL from the district court of the seventh judicial district. The facts are stated in the subjoined opinion.

————, for plaintiff.

Mr. Lee and *Horace Hawes*, for defendant.

By the Court, BENNETT, J. The complaint is founded upon a special contract, by which the plaintiff agreed to build a

corral for the defendant for the sum of $2400, and it alleges that the work was completed within the time, and of the dimensions, required by the contract. The answer denies the making of the contract, and also that the "plaintiff built and completed "a *corral* for the defendant in manner and form as the plaintiff "has above thereof complained."

At the trial the defendant offered to prove, "that the *corral* "mentioned and described in the complaint was not built in a "workmanlike manner, and that it would not answer the pur-"pose for which it was intended." This offer was overruled by the court, and the proposition thus presented forms the only point in the case.

Under the new system of practice adopted in this state, the plaintiff is required to set forth in his complaint a statement of the facts constituting his cause of action, (*Practice Act, sec.* 38,) and the defendant, in his answer, a general or specific denial of each allegation of the complaint controverted by him, and a statement of any *new matter* constituting a defense. (*id. sec.* 45.)

We think that the defect, if any existed, in the construction of the *corral*, was *new matter* within the meaning of this clause of the statute, which should have been specially set up in the answer. The object aimed at by our system of pleading is to apprise the opposite party of the nature of the action, and of the grounds of defense, which the parties respectively intend to rely upon at the trial. This purpose will be more surely attained by requiring such a defense as the one under consideration, to be specially alleged in the answer. Under the old plea of the general issue in an action of assumpsit, the defense that work for which the plaintiff sought to recover, was performed in an unskillful manner, has been in some cases held to be admissible; (10 *Barr*, 43 ;) while, in others, it has been required to be specially noticed. (*The Mayor, &c., of Albany* v. *Trowbridge*, 5 *Hill*, 71; *Barber* v. *Rose*, *id.* 76.) We think the doctrine of the latter cases more consistent with our system of pleading, than that of the case cited from *Barr's Reports*, and shall, accordingly, adopt it. It follows that the ruling of the district

judge in excluding evidence to prove that the *corral* was not built in a workmanlike manner, was correct.

The exception, so far as regards the other portion of the judge's decision must also be overruled. There was a contract between the parties, by which the plaintiff bound himself to construct a *corral* of certain specified dimensions; and, at the trial, the defendant offers to prove that the *corral* built by the plaintiff *would not answer the purpose for which it was intended.* This was not the point properly in issue. The question was whether the *corral* was built according to the terms of the contract? If it was, the plaintiff was entitled to recover, whether it answered the purpose for which it was intended or not. The judgment should be affirmed.

Ordered accordingly.

HOPPE *vs.* ROBB. Affirmed 2 Cal. 11. 23

Where there is conflicting evidence upon a point submitted to, and passed upon by a jury, their verdict will not be disturbed; and the same rule applies where a question of fact is submitted to the *court without a jury.*

APPEAL from the district court of the sixth judicial district.

Mr. Sandford, for plaintiff.

Mr. Tingley, for defendant.

By the Court, BENNETT, J. The action was for money loaned. The question for determination at the trial was whether the money was advanced as a loan, or by way of subscription for the purpose of establishing a newspaper at San José. There was conflicting evidence upon this point, and the judge of the district court found that the money was advanced as a subscription.

We have frequently held that we would not review the verdict of a jury upon a question of fact, where there was conflicting or contradictory evidence, upon which the verdict was based. The same rule applies to the finding of a judge, to whom a question of fact is submitted, and upon which he has passed. The judgment in this cause must, therefore, be affirmed.

Ordered accordingly.

FOLSOM *vs.* ROOT *et al.*

Where the record returned to this court contains nothing but the pleadings and the judgment of the court below, without embodying the testimony given at the trial, this court will presume that the evidence was sufficient to sustain the judgment; and this, although it appear in the *judgment* itself entered up by the judge of the court below, that the judgment was based upon grounds wholly untenable.

APPEAL from the court of First Instance of the district of San Francisco. The substance of the complaint and answer in this cause, is stated in the opinion of Mr. Justice Lyons. But in addition to that portion of the decision of the judge of First Instance, given in the opinion alluded to, are found several other matters. Two questions were presented by the pleadings, one of title, the other of possession; and the judge of First Instance, in giving his judgment, sets out in full the *title* of the plaintiff, without in any way whatever alluding to his *possession*, and then decides that the plaintiff was entitled to judgment in his favor. The cause was twice argued, once before Justices Lyons and Bennett, and again before a full bench. After the first argument the court decided in favor of the defendants—on the second argument in favor of the plaintiff, Justice Bennett dissenting. The following opinion was delivered as expressing the views of the court on rendering the first judgment.

A. Peachy, for plaintiff.

R. A. Wilson, for defendants.

By the Court, BENNETT, J. This case is in almost all respects the same as the case of *Woodworth* v. *Fulton*, decided at the last term. The plaintiff claims title under a grant made by an American Alcalde, during the continuance of the war between the United States and Mexico, and the defendants derive their title from a justice of the peace. It clearly appears from the judgment of the court of First Instance, that the plaintiff was permitted to recover solely upon the assumption of the *validity of his title*, and not upon the ground that he had ever been in the *actual possession* of the premises, and had been ousted by the defendants. In *Woodworth* v. *Fulton* it was held, that a title of precisely the same character as that upon which the plaintiff recovered in this suit, was void and of no effect. The defendants having been in actual possession at the time of bringing suit, they should have been protected in such possession, until some better title than their own was adduced against them. Such was not the title under which the plaintiff recovered. The judgment should, therefore, be reversed, and the defendants be restored to the possession and the rights which they respectively enjoyed at the time of the commencement of the suit,

On the re-argument the following opinion was delivered :—

By the Court, LYONS, J. Respondent on the thirty-first day of January, 1850, filed in the court of First Instance a complaint setting forth that he is the legal owner of a certain lot of land in the city of San Francisco, more particularly described in said complaint—that his title to the same is derived (through one Walter Herron) by grant from an American Alcalde, made during the war between the United States and Mexico. And he also avers, (fol. iii. of record,) that he was, and had been since the thirtieth day of March, 1848, in undisturbed possession—further, that appellant, claiming title to the same property, by virtue of a grant from a justice of the peace, had attempted to exercise the ownership, and had leased the lot to certain persons therein named—and that complainant's rights were further threatened by one George W. Sands, who was preparing to

build on the described premises; and he prays that an injunction may issue to restrain all these parties from their unlawful acts. The writ prayed for seems to have issued, though it is not contained in the record, and a motion by defendants to dissolve the same being overruled, they were ordered to answer. This they omitted to do; but one George T. Sullivan, whose name now first appears in the record, filed an answer alleging that *he* was the owner of the lot in dispute, having purchased the same from Root by deed, bearing date the 20th day of December, 1849, and that he had subsequently leased the premises to the parties complained of. The answer contains no other averments, except a general denial that respondent "has any "right to said premises."

It will be seen that Sullivan does not traverse the allegation of respondent, that he was in "undisturbed possession," but sets up his own deed from Root.

In the case of *Woodworth* v. *Fulton*, we held that a title similar to that adduced by respondent was void, and of no effect. We have not been called upon to decide on the validity of grants from justices of the peace, nor does this case present that question for determination. This court has declared its intention to protect the rights of the *actual possessor;* and from the papers before us we must conclude that Folsom enjoyed that right. It is distinctly averred in the complaint, and is not denied in the answer. No evidence whatever is returned with the record, and we are unable to judge of the character of the investigation allowed in the court below. We are informed that "the parties being ready for trial, the court hears the proof and "finds for the plaintiff, and makes the following decree." (Here follows a recital of the case *in extenso.*) Then the court makes this final decree: "That Joseph L. Folsom recover judgment "for his title and *possession* of said premises," &c. The finding of the court has in this case the force of a verdict of jury, and the judgment or decree entered thereon cannot in any way impair the effect of such finding, whatever extraneous matter may be embodied therein. We are not prepared to disturb a verdict, unless it clearly appears that it is erroneous. In the

case at bar there is no evidence submitted for our examination, and we cannot doubt the correctness of the verdict. The court below, as appears from its decree, pronounced upon both the questions of title and of possession, and if it erred on one only, judgment on the other is not thereby vitiated. It cannot be doubted that if the court had gone no farther in its judgment than to decree the possession claimed in the pleadings, the judgment would stand. Will it be contended that error in regard to the other questions, entitles appellants to reversal of that portion which is not erroneous? But the true defendants in this case are in default,—they set up no equities even against plaintiff's possession, do not deny they were about to intrude and commit the injuries which complainant asks to have them restrained from doing, do not claim to have been themselves in possession, or that they had been illegally ousted, but seemed to rely solely on the insufficiency of respondent's title. If the appellants have rights, the pleadings in this action do not present them for adjudication. Both parties allege title, but the record does not show that either produced in court the muniments thereof. The opinion of this court is known on that, under which respondent claims,—of the validity of appellants' title we have not before us the means to judge. It is, therefore, ordered, adjudged, and decreed, that so much of the judgment of the court of First Instance as decrees the possession of the premises claimed, to respondent, be affirmed, and that so much as decrees title be reversed.

Ordered accordingly.

Bennett, J. (dissenting.) I dissent from the opinion of the majority of the court in this case. I think our former decision correct. I think it clearly appears from the record that the plaintiff had neither title nor possession. It is agreed by all the members of the court that he had no title, but the majority of the court say we must presume that he had the actual possession, because the court of First Instance rendered judgment in his favor. That is a doctrine to which I might perhaps assent, if the

court of First Instance had simply given judgment for the plaintiff. We have often held, where a case comes up solely on the pleadings and judgment, without any evidence, we would presume that sufficient evidence was given to warrant the judgment.

But this case is widely different. The complaint, although it alleges in general terms that the plaintiff had been in possession of the premises, does not pretend that he had ever been ousted by the defendants. The answer, though informal and loose, substantially denies the allegations of the complaint, by denying that the plaintiff had any right in the premises. Then the court, sitting as a jury, finds the facts which had been established. I look upon that finding of facts in the same light as I would look at a special verdict of a jury; and the judgment of the court, which is nothing but the conclusion of the court deduced from these facts, being palpably erroneous, I think it should be reversed.

TYSON *vs.* WELLS *et al.*

Where an order granting a new trial was made in the court below upon the payment of costs, and the defendants paid the costs, and the plaintiff then appealed from the order, and a motion was made to dismiss the appeal on the ground that the acceptance of the costs by the plaintiff's attorney was a waiver of the right to appeal; *Held*, that the acceptance of the costs was not a waiver of the right of appeal, and the motion was accordingly denied.

Mr. Burritt, for the motion.

John Chetwood, in opposition.

By the Court, BENNETT, J. Motion to dismiss appeal. An application was made for a new trial in the superior court of the city of San Francisco, and the court made an order granting a new trial upon the payment of costs by the defendants. The attorney for the plaintiff caused his bill of costs to be made out

and presented it to the defendants, who paid it. An appeal was then taken from the order granting a new trial, and this motion is made to dismiss the appeal upon the ground that the acceptance of the costs by the plaintiff's attorney was a waiver of the right of appeal. We think the motion should be denied. The order appealed from was a conditional order. The report of the referees, and the judgment of the court based thereon, remained in full force until the performance of the condition specified in the order granting a new trial. The order was inoperative until the costs were paid, and it would have been useless for the plaintiff to appeal before the condition was performed by which alone his judgment could be disturbed. This decision in no respect affects the question whether an appeal will lie from an order granting a new trial.

Motion denied.

THE PEOPLE *vs.* McCAULEY.

The act of the legislature, by which a district judge of one district is empowered to hold a district court in another district, is constitutional and valid; and a court held in pursuance of such act by a district judge in a district other than the one for which he was elected, is not, for that reason, improperly organized.

This court will not review on appeal, any irregularities of a mere technical character occurring in the progress of a trial in the district court, where no objection was raised at the time, and where such irregularities do not appear to have affected the administration of justice.

Affidavits, on which a motion to change the place of trial in a criminal case is founded, must state the *facts and circumstances* from which the conclusion is deduced that a fair and impartial trial cannot be had in the county in which the indictment was found: a statement, in *general terms*, that a fair and impartial trial cannot be had, or a statement that the deponent verily *believes* that a fair and impartial trial cannot be had *on account* of popular excitement and false reports, is insufficient.

A person is not disqualified from sitting as a juror on the trial of a criminal cause, on account of his having formed and expressed an opinion from reports, when he declares, and the court is satisfied from his examination, that he can sit on the jury without bias, that evidence can change his opinion, and that he will be governed by the evidence. To exclude a juror on the ground of implied bias, under the criminal code of this state, he must have formed or expressed an *unqualified opinion*

or belief that the prisoner is guilty of the offense charged, and upon this question, it is for the court to determine both the law and the fact.

The charge of a judge to a jury should be given with reference to the testimony adduced on the trial; and where the charge is returned on appeal, but no portion of the testimony, this court will not undertake to determine as to the correctness or incorrectness of the charge.

APPEAL from the district court of the seventh judicial district. The facts, so far as the points of law decided in the case are concerned, are sufficiently stated in the opinion of the court.

John A. McDougall, (attorney general,) for the people.

Gregory Yale and *Mr. Lee*, for defendant.

By the Court, BENNETT, J. The defendant was convicted of the crime of murder at the March term of the district court held in and for the county of Nappa, and from the judgment rendered on such conviction an appeal is taken to this court. Numerous causes have been urged by counsel for the appellant, as constituting error in the proceedings of the district court, some of which are plausible, but none of which do we deem tenable.

The first point made by the appellant is, that the judge before whom the cause was tried had no authority to preside at the trial, and that, consequently, all the proceedings before him were *coram non judice* and void. This objection is based upon the assumption that the judge, who is conceded to be the legally appointed and qualified judge for the ninth judicial district, had no power to exercise any of the functions of his office beyond the limits of his own district. The argument in support of this proposition is urged upon constitutional grounds solely. So far as statutory authority is concerned, it is not denied that the court was regularly held by an officer exercising the powers conferred upon him by an act of the legislature. The question is, therefore, a question purely of constitutional interpretation.

Section one of Article six of the constitution declares that the judicial power of the state shall be vested in a supreme court, in district courts, in county courts, in justices of the

peace, and in municipal and other inferior courts which the legislature should see fit to establish. Section five of the same Article declares that the state shall be divided by the first legislature into a convenient number of districts subject to such alteration from time to time as the public good may require, for *each* of which a district judge shall be appointed by the joint vote of the legislature, at its first meeting, who shall hold his office for two years from the first day of January next after his election; after which, said judges shall be elected by the qualified electors of their respective districts, at the general election, and shall hold their office for the term of six years.

It is urged that, inasmuch as a district judge is required to be appointed for each district, the legislature can neither require nor empower him to perform any judicial duties beyond the prescribed territorial limits of his district. The reason given for this construction is, that the people of each district have the constitutional right to have justice administered between them by such judges only as they have themselves elected. This seems, however, to have been, in no respect, the intention of the constitution, for that instrument subjects the districts to "such alteration from time to time as the public "good may require." Had it been the intention of the constitution that no judge should hold a district court in any counties except in those which had participated in his election, this power to alter the districts in such manner and at such times as the legislature should deem conducive to the public good, could scarcely have been conferred. The reason given in support of the appellant's proposition, we apprehend, is overthrown by the very section of the constitution from which his argument is deduced.

Our constitution must be construed with reference to the known changes in the organic laws of the respective states. In most of the states there are district or circuit judges, having powers and jurisdiction corresponding to the powers and jurisdiction of the district judges under the constitution of this state. In some of the states, these judges are appointed by the governor by and with the advice and consent of the senate; in others,

by the legislature, and in some, they are elected by the people. The tendency of modern constitutions is to give the election of judges to the people; and this, we think, is the only change, so far as district judges are concerned, contemplated by the constitution. It was not intended to abridge the power of the legislature to prescribe the territorial extent of the jurisdiction of district judges. And it is, we believe, an almost, if not quite, universal rule in all the states, that a district judge of one district is competent to exercise the functions of his office in any other district according to the requirements of legislative provisions. Were a construction different from this to be put upon the constitution, it would lead to insupportable delays in the business of the district courts. For these reasons we think that the court was held by a competent judge. Had the court been held by a person assuming to be a district judge, but who had not been appointed or elected to office in the manner prescribed by the constitution, the case would have presented a different aspect, which it is unnecessary now to consider.

Numerous objections are raised to the proceedings on the trial, to which the answer is apparent, that no objection was made at the time, and the defendant must be deemed to have assented. Such are the objections to the empanelling of the grand jury, the indorsement of the bill of indictment by the foreman, the want of signature thereof by the district attorney, the irregularity in the arraignment of the defendant and in the summoning and empanelling of the trial jury, the form of the verdict, and the time within which the sentence was pronounced. Even if any irregularities were committed in these respects, a court of appeal cannot review them, where no objection was made to them in the court below, and more especially where this court cannot see that such irregularities affected, in the slightest degree, the administration of substantial justice.

A motion was made to change the place of trial from Nappa county to one of the adjoining counties. The motion was founded on affidavits made by the defendant and others. The defendant states in his affidavit, in general terms, that a fair

and impartial trial cannot be had in the county of Nappa, and the other deponents state that they verily *believe* that the defendant cannot have a fair and impartial trial in Nappa county, on account of the popular excitement and feeling manifested against the accused, and on account of the many false reports in circulation prejudicial to him. The court denied the motion, and properly. The sections of the "act to regulate proceedings in criminal cases," which affect this point, are as follows:

"Sec. 330. A criminal action, prosecuted by indictment, "may be removed from the court in which it is pending, on the "application of the defendant, on the ground that a fair and "impartial trial cannot be had in the county where the indict-"ment is pending.

"Sec. 331. The application must be made in open court, "and in writing, verified by the affidavit of the defendant, and "a copy must be served upon the district attorney at least one "day before the application is made to the court.

"Sec. 332. If the *court be satisfied that the representation "of the defendant is true*, an order shall be made for the re-"moval of the action to the nearest district court of an adjoin-"ing county which is free from the like objection."

Under this statute, we deem the affidavits upon which the application was made, entirely insufficient even to justify the court in ordering a change of the place of trial. Affidavits for such a motion must state the facts and circumstances from which the conclusion is deduced that a fair and impartial trial cannot be had. The conclusion is to be drawn by the court and not by the defendant and his witnesses, and the court must be satisfied from the facts and circumstances positively sworn to in the affidavits, and not from the general conclusions to which the defendant may swear, or which his witnesses may depose that they verily *believe* to be true. In the case at bar the court was not *satisfied* that the representation of the defendant was true; and we are of the opinion, that no court should be satisfied of the necessity or propriety of removing the trial of an indictment from one county to another, by such

rect in certain cases; whether they fitted this case cannot be ascertained from the record. If the appellant desired to show that they were incorrect, he should have spread upon the record the testimony or the facts in relation to which the law was laid down by the court.

In conclusion, we have only to add, that the defendant has been convicted by a jury, and that there is nothing in the record before us to induce the belief that he has not had a fair and impartial trial on the merits, or that he has been deprived of any legal or technical benefit or advantage given to him by law.

The judgment of the district court must be affirmed.

Ordered accordingly.

THE CITY OF SAN FRANCISCO *vs.* CLARK *et al.*

Whether driving piles in Front street, in the city of San Francisco, (the street being laid out over the waters of the bay,) is an obstruction to the free use of the street by the public, is a question of fact for the jury; and where that question was not so submitted, a new trial was granted.

The case of *Woodworth* v. *Fulton*, (*ante*, *p.* 295,) affirmed.

APPEAL from the superior court of the city of San Francisco. The facts are stated in the opinion of the court.

John W. Dwinelle, for The City.

R. Lockwood, for defendants.

By the Court, BENNETT, J. The action was brought for the purpose of perpetually enjoining the defendants from driving piles in a street in the city of San Francisco known as Front street. The defendant, Clark, claims to be the owner of certain



lands bounded on Front street, and was engaged in driving piles for the purpose of making his lot accessible by way of this street, when the injunction was served upon him. It seems to have been conceded, on the argument, that the place where the defendants were driving piles, was a part of Front street, and the only question in the case is, whether the piles were an obstruction to the free use of the street by the public. It is well known as a matter of fact, that Front street, as laid down on the map of the city, lies below low water mark in the bay of San Francisco, and it is equally well known, as a matter of fact, that the ordinary method, if not the only one, of making this street and others similarly situated capable of use, is by driving piles and by planking over them. The defendant was enjoined from doing the very thing, by which alone Front street could be made passable; and how such act could be an *obstruction* to the street it is difficult to see. But we cannot take judicial notice of the fact, that Front street is laid out over the water, or that driving piles is no obstruction. These are matters which should be submitted to the jury. They were not so submitted, and a new trial should therefore be granted.

The grant which was offered in evidence was properly rejected. It conveyed no right to the defendant. (*Woodworth* v. *Fulton*, *ante*, *p*. 295.) What effect the late Act of the legislature may have had in confirming this grant is a question which does not arise on this appeal.

New trial granted.

Dwinelle *vs.* Henriquez.

Where the evidence given on the trial of a cause is conflicting, and no legal point has been improperly ruled by the court, the verdict of a jury is conclusive.

Where a written or printed instrument, as for instance a "card" published in a newspaper, is proposed to be given in evidence, and is rejected by the court, such evidence or the substance of it must be returned with the record, or this court will not attempt to review the decision of the judge at the trial.

said or intended to say in the article published by him in the newspaper that the defendant was not bound to pay him his fees, was a statement of *new matter*, not responsive to the inquiries put to him by the defendant, and that consequently, the defendant was entitled to give his testimony on his own behalf, in explanation or contradiction of the testimony of the plaintiff.

Section 296 of the Practice Act of April 22, 1850, provides that a party to an action may be examined as a witness at the instance of the adverse party. Section 301 is as follows:—

"A party examined by an adverse party, as herein provided, "may be examined on his own behalf in respect to any matter "pertinent to the issue. But if he testify to any *new matter* not "responsive to the inquiries put to him by the adverse party, or "necessary to explain or qualify his answer thereto, or discharge, "when his answer would charge himself, such adverse party "may offer himself as a witness on his own behalf, in *respect to* "*such new matter*, and shall be so received."

Conceding that the plaintiff testified to new matter, which is by no means clear, what was such new matter? It was whether he said or intended to say in the newspaper article that the defendant was not bound to pay him his fees. It was not whether, according to the original understanding between the plaintiff and defendant, the latter was or was not to pay the plaintiff, or whether his pay depended upon the contingency of his success in the proceedings he was about to take. It was simply what he said or intended to say in the newspaper article. The jury had that article in evidence before them, and could put their own construction upon it. But the defendant was not offered for the purpose of proving what was said or intended to be said in that article, but to prove *the whole understanding about the fees*. The plaintiff introduced no new matter in relation to the original understanding concerning fees. We think the decision of the court correct.

After the evidence was closed, the court, at the request of the plaintiff, charged the jury that the note from the defendant to the plaintiff of the 26th of June, proved an absolute retainer

upon which the plaintiff was entitled to recover for his services what they were reasonably worth, unless such retainer was afterwards modified upon a good consideration. And, at the instance of the defendant, the court charged the jury, that if they believed the understanding between the plaintiff and defendant was, that the plaintiff's counsel fee was to be assessed and charged upon the estate, and was to depend upon the successful termination of the proceedings in the matter, then the jury would find a verdict for the defendant.

This charge must all be taken together, and considered in this way, it was substantially correct. The charge of the judge in substance was, that upon the written retainer of the defendant, the plaintiff was entitled to recover a reasonable compensation for his services; but if the understanding was, that the plaintiff was to look for his fee to the estate and not to the defendant personally, or if his fee was to depend upon the successful termination of the proceeding, then the verdict should be in favor of the defendant.

We think this charge correct. The retainer was an absolute and not a conditional retainer upon its face. The construction of it, like the construction of all contracts and documents, was a question for the court to decide, and not for the jury. At the same time, this retainer did not specify in what manner or by whom the plaintiff's fees were to be paid, and it was proper to allow evidence to be given for the purpose of showing whether his fee was to be a contingent fee, depending upon success, or whether it was to be a personal charge upon the defendant. These questions were, we think, fairly submitted by the court to the jury, and their verdict by which they have found that the fee was not to be a conditional or contingent fee, and that it was not the intention of the parties that the defendant should be exempt from personal responsibility, ought not to be disturbed by us, on the ground of the instructions to the jury which we have above considered.

The only remaining question in the case is whether the defendant, the public administrator of the county of San Francisco, is personally liable to the plaintiff. It is contended by

the defendant that he was a public officer, and that, in retaining the plaintiff, he acted in his official capacity, and, consequently, is not personally liable.

That a public officer who stands in the relation of agent of the government or of the public, is not personally liable upon contracts made by him as such officer and within the scope of his legitimate duties, is a doctrine clearly established, and not controverted by the plaintiff. (2 *Kent*, 632; *Story on Agency*, *Chap. XI; Hodgson* v. *Dexter*, 1 *Cranch*, 345; *Walker* v. *Swartwout*, 12 *J. R.* 444; *Brown* v. *Austin*, 1 *Mass. R.* 208; 10 *Conn. R.* 329.) This doctrine is upheld on the presumption, that the contract was made upon the credit and responsibility of the government or the public, which would be ready and able to fulfil it promptly and with good faith. But this reason does not apply, when neither the government nor the public in any way can be considered or held responsible for a contract made by a person, although he may be a public officer. Neither the state, county, town or city, is liable on contracts made by the public administrator; and, although he is a public officer, we think he is personally liable upon contracts made in relation to estates upon which he administers, unless the idea of such personal liability be excluded by the contract.

That an executor or administrator is, in ordinary cases, personally liable upon contracts made by him, in his representative capacity, after the death of the person whom he represents, and supported by some new consideration, is well established. (*Story on Contracts*, *sec.* 282, 283, 287; *Addison on Contracts*, 382.)

The defendant in this case was the representative, not of the government, nor of any political subdivision of the state, but of a private estate, committed to his charge, for his services in relation to which he was entitled to receive a per centage as compensation. He was appointed, it is true, in a different way from that in which executors and administrators are ordinarily appointed, but we do not see how a distinction can be made between contracts made by him with third persons, and contracts made by common executors and administrators. The mode of

appointment is different; the responsibility the same. There is no doubt that a private administrator in such a case as this would be personally liable, and according to our views the public administrator is equally so.

Judgment affirmed.

MACONDRAY *vs.* SIMMONS *et al.*

Under Mexican law, a person who furnishes materials for the erection of a building, has no lien on the building to secure payment for the materials furnished.

The plaintiff having a claim against A., brought suit against him to enforce the claim, and, in the same action, sought to set aside a conveyance of real estate from A. to B., on the ground that it was executed in fraud of the creditors of A., and made B. a party to the suit; *Held*, there having been no objection taken, either by demurrer or answer, on the ground of an improper joinder of several causes of action, that the plaintiff was entitled to contest the validity of the conveyance from A. to B.

If several causes of action are improperly united in the same action, the objection must be taken either by demurrer or answer, or it will be deemed to have been waived.

APPEAL from the district court of the district of San Francisco. The facts are stated in the opinion of the court.

By the Court, BENNETT, J. The papers in this cause were consumed in the late fire which occurred in this city. According to our recollection, the facts of the case were as follows:—Macondray furnished certain materials for a building, which Simmons put up, previous to the adoption of the common law. An attachment was issued against the property for the purpose of enforcing the lien, and on the same day on which the attachment was issued, Simmons conveyed the property to the other defendant Knowles. The complaint alleged the amount of the indebtedness of Simmons for the materials furnished by the plaintiff, and charged that the conveyance to Knowles was fraudulent, insisted upon the plaintiff's having a lien upon the

buildings, and charged that Knowles had notice of such lien at the time of the conveyance to him, and prayed that the conveyance to Knowles might be set aside as fraudulent, and the premises sold to satisfy the lien. The defendants took issue upon the several allegations in the complaint, and, at the trial, the plaintiff proposed to prove that the conveyance to Knowles was made in fraud of the creditors of Simmons, and insisted that the conveyance should be set aside, and the premises sold to satisfy his lien. The court held that no lien existed, and excluded the proposed evidence to show fraud in the conveyance to Knowles.

Two propositions are presented by the case on the part of the plaintiff; 1st, That he had a lien upon the premises under Mexican law; and, 2d, That even though he had no such lien, he was entitled to inquire into the validity of the conveyance to Knowles.

On the first point we think the court decided correctly. We think there was no lien. We find it laid down in the Mexican books, that he who loans *money* for the purpose of building, repairing, or supplying a ship, house, or other building, has a tacit lien thereon for the reimbursement of his loan. (*Escriche*, *Dic. de Legislacion*, *Art.* "*Hipoteca Legal;*" 5 *Feb. Mej. page* 368; 3 *Sala Mej.* 115; 1 *White's Rec.* 140.) But we do not find it laid down in either of the authorities above cited, which are all strictly works on *Mexican* law, with the exception of *White's Recopilacion*, that a person who furnishes materials for the *erection* of a building, has any lien. Nor is any such doctrine to be found in the citation of the plaintiff's counsel from the *Partidas*, either at the page cited (*page* 878, 2*d vol. Part.*,) nor on pages 970 and 971, where this subject is more particularly treated of. It is true that it is laid down in *Browne's Civil Law*, (1 *vol.*, *page* 207,) that the *repairer* of a house has a lien thereon, but even this does not support the plaintiff's case; while in *Mackeldy*, (*page* 382,) it is said that a lien does not exist in favor of one who has merely furnished materials or labor on credit for the restoration of a building. There is nothing, therefore, in the Mexican law, which countenances the plaintiff's

claim of lien, and though it might be inferred from *Browne* that such a lien would be sanctioned by the civil law, yet the inference is equally strong from *Mackeldy* that it would not. The court, we think, decided correctly upon this point.

Should the plaintiff have been permitted to contest the validity of the deed to Knowles in this suit? He had a claim against the defendant Simmons for materials furnished, for which, perhaps, he was entitled to judgment. If he were entitled to judgment on this claim, then he would have had the right to institute proceedings to set aside the conveyance to Knowles on the ground of fraud. The only question for determination on this branch of the case is, whether a demand against Simmons personally, can be united with a cause of action against Simmons and Knowles to set aside the conveyance of the former to the latter on the ground of fraud. Section 61 of the Practice Act declares, that the plaintiff may unite several causes of action belonging to certain specified classes of cases, but that the causes of action so united, must belong to only one of those classes, and must affect all the parties to the action, and must be separately stated. There may have been in this case a defect of parties, and several causes of action may have been improperly united, but the defendants must be deemed to have waived any objection on these grounds, for not having taken the objection by demurrer or answer. (*See sections* 40, 43, *and* 44 *of Practice Act.*) If we have recollected correctly the substance of the facts of the case, we think a new trial should be granted, for the purpose of giving the plaintiff an opportunity of establishing his claim against Simmons personally; in which case, he would be entitled to a judgment for the amount proved against Simmons individually; and, at the same time, of contesting the validity of the conveyance to Knowles; and in case of his proving successful therein, of having an order entered setting aside the conveyance, so that the premises in question may be sold to satisfy the judgment.

Ordered accordingly.

ELLIOTT vs. OSBORNE *et al.*

A motion for a new trial in the district court, must be made within four days after rendition of the judgment.

An injunction order is inoperative, until the undertaking required by the statute be given.

A party against whom an injunction has been issued, is not bound to obey it, *until* after due service thereof on him. Giving him *verbal* notice that an order enjoining him has been made, is not sufficient.

An injunction order and the due service thereof on the party enjoined, do not operate to enlarge the time within which an act is required to be done by the party procuring the order.

IT *seems*, if a party be in court at the time an injunction order is made, and thus has personal knowledge of the order, that he would be bound thereby. *Per* BENNETT, J.

APPEAL from the district court of the district of San Francisco. The facts are stated in the opinion of the court.

Allen T. Wilson, for plaintiff.

Mr. McHenry, for defendants.

By the Court, BENNETT, J. The papers in this cause were destroyed by the late fire, and we must rely upon our recollection of the facts, as presented on the argument. They were in substance as follows: A judgment was recovered against the defendants in the district court, and a motion for a new trial was made in the cause some thirty days after the rendition of the judgment. The court denied the motion, and from the order of the court refusing to grant a new trial this appeal is taken.

It is provided by section 252 of the Practice Act, that a party who feels himself aggrieved by a judgment against him, may, within four judicial days after such judgment has been rendered, pray for a new trial, which must be granted, if there be good ground for the same. According to this section a motion for a new trial must be made within four days after judg-

ment; the motion in this case was not made within that time, and was therefore properly refused for that reason, unless there be circumstances which take the case out of the general rule.

It is claimed by the appellants that such circumstances did exist. An order for an injunction was made in another suit, between other parties, for the purpose of enjoining the proceedings of the plaintiff in the present suit. This order of injunction was not *served* before or at the time of the trial, nor until three days after the judgment became final; but before the judgment became final, one of the defendants' attorneys informed the plaintiff's attorney, that such order had been made. But it appears that, at the time such information was given, no written undertaking had been given on the part of the plaintiff in the injunction suit; and we apprehend that an order for an injunction must be deemed inoperative until such undertaking be given; otherwise the party enjoined would have no security for any damages which he might sustain by reason of the injunction. (*Sec.* 120 *of Practice Act.*) But we think that giving information of an order of injunction, is insufficient to affect the party to whom it is given. If a party be in court at the time the order is made, and thus has personal knowledge of the order, the case might be different. There he would probably be bound by the order, even without service thereof upon him. But we do not think that the information given to the plaintiff's attorney in this case, can be considered as restraining either him or his client from the prosecution of the suit. The injunction order, therefore, must be deemed as of no effect until the service thereof, which was not until three days after the rendering of final judgment.

The only remaining question, then, is, whether the service of the injunction one day before the expiration of the time allowed for moving for a new trial, can be considered as staying the running of the time. If so, the motion for a new trial, made some thirty days after final judgment, was in time; if not, the motion was made too late. An injunction restrains the acts of the party, but it does not and cannot stay the running of time; the effect of it cannot be to postpone to a future day

the doing of a thing which is required to be done now by the party procuring the injunction. The conclusion results, that the motion for a new trial was made after the expiration of the time limited by the statute for making it, and was therefore properly denied by the court.

If we are not mistaken in the facts of the case, we think our conclusions correct. But owing to the loss of the papers furnished us on the argument, we may have been mistaken in some of the circumstances, and if the counsel for the appellants thinks that we have not correctly apprehended the substance of the material facts, we shall be ready to listen to a motion for a re-hearing, on being furnished with another copy of the return.

Judgment affirmed.

The counsel for the defendants, having procured a second return from the district court, applied for a re-hearing, on which application the following opinion was delivered by

Bennett, J. Having examined the copy of the record which has been furnished us, we are of the opinion that our former decision was correct. The record shows that final judgment was rendered on the third day of February, and that on the same day an injunction was issued in another suit between different parties to stay the plaintiff's proceedings in this suit. The injunction was not served, as appears by the return of the sheriff, on the plaintiff until the tenth day of February.

On the seventh day of February the time expired for moving for a new trial, four days having elapsed since the judgment was rendered. The application for a new trial was not made until the 11th day of February, and no order had been procured extending the time limited by statute for making such motion. We held in our former opinion in this case, that the making of the injunction order, or even the service of it, could not operate to extend the time for making the motion for a new trial. The motion was, therefore, made too late, and after the court had lost the right under the statute to entertain it. This was the

principle upon which our former decision was based. We think it correct, and a re-hearing should therefore be denied.

Ordered accordingly.

GARDET *vs.* BELKNAP & WHITE.

A delivery of goods, in order to take a case out of the statute of frauds, must be of such a nature, that the property is placed under the control and power of the vendee; and the acts to change the possession of the property from the vendor to the vendee, must be such as to deprive the vendor of his *right of lien* as security for payment of the *purchase money*.

Words alone unaccompanied by acts cannot make out a delivery.

APPEAL from the superior court of the city of San Francisco. The facts of the case are stated in the opinion of the court.

E. Temple Emmett, for plaintiff.

Elisha Cook, for defendants.

By the Court, BENNETT, J. The suit was brought for goods sold and delivered. The facts of the case were, that the defendants called at the plaintiff's store, and agreed verbally to give him $1,37\frac{1}{2}$ per gallon, for the quantity of brandy he had on hand of a particular brand and in good casks, and the plaintiff agreed verbally that the defendants might have it, as soon as he could select and set apart the good casks. There was no evidence that the brandy contained in the good casks, was ever separated from other brandy which the plaintiff had. No bill of sale was made out by the plaintiff, no mark was placed upon the liquor sold to designate it as belonging to the defendants, no entry was made in the plaintiff's books, and no writing or memorandum of any kind was made of the sale.

Some days after the verbal agreement above mentioned, the

plaintiff's clerk called at the store of the defendants, when one of the defendants asked him if he could not sell the brandy, to which the clerk replied that he could on account of the defendants, and went away. The next day the clerk called again, when the defendants disputed the quantity which it was claimed they had agreed to take, but stated that they were ready to receive the quantity agreed upon, if the plaintiff could deliver it according to agreement. The brandy had never been removed from the plaintiff's store, and was there destroyed by fire.

On this state of facts the defendants moved for a nonsuit on the grounds; 1st. That no note or memorandum of the contract had been signed by the defendants; 2d. That no part of the brandy had been delivered, and no part of the purchase money paid; and 3d. That something remained to be done by the parties for the purpose of designating the quantity of the brandy sold and the quality of the casks, by way of selecting and setting apart the liquor, before the title could pass to the defendants.

The court denied the motion for a nonsuit; the cause was submitted to the jury, who found a verdict for the plaintiff in the sum of $1780.

It is unnecessary to consider all the grounds on which the motion for a nonsuit was made, as we are satisfied that it should have been granted on the ground that there was no delivery or part delivery of the property sold, so as to take the case out of the statute of frauds.

It is provided by section 18 of the act concerning fraudulent conveyances and contracts, passed April 19, 1850, that every contract for the sale of any goods, chattels, or things in action, for the price of two hundred dollars or over, shall be void, unless; 1st, a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged therewith; or, 2d, unless the buyer shall accept or receive part of such goods, or the evidences, or some of them, of such things in action; or, 3d, unless the buyer shall at the time pay some part of the purchase money.

No note or memorandum of the contract in this case was made in writing, and no part of the purchase money was paid,

and, consequently, if the defendants neither accepted nor received a part of the brandy, the contract was void, and cannot be enforced. If there was no delivery, there could be no acceptance, and the question whether there was an acceptance, is the same as the question whether there was a delivery.

There was no pretence that there was an actual delivery of the brandy, but a constructive delivery is sought to be made out from the fact that one of the defendants asked the plaintiff's clerk if he could not sell the brandy, to which the clerk replied that he could on account of the defendants. It does not appear that the defendants authorized the clerk to sell the brandy on their account, or that there was any agreement between the parties to that effect.

To hold that such a transaction amounted to a delivery within the statute of frauds would be equivalent to a repeal of the statute.

The decisions both of England and of the United States have been fluctuating upon the point as to what shall constitute a delivery. The delivery must be such as the nature of the case admits. Wine may be delivered by giving up the keys of the wine cellar; and the consent of a party upon the spot is sufficient possession of a column of granite, which, by its weight and magnitude, is not susceptible of any other delivery, and when the declared intention is to take possession. A bill of sale of timber and materials of great bulk, or marking the timber, has been held such a delivery and change of possession as the subject matter reasonably admitted. Taking a bill of parcels and an order from the vendor on the storekeeper for the goods, and going and marking them with the initials of the vendee's name—taking a bill of parcels and an order on the warehouseman, and paying the price—the communication of the vendor's order on a wharfinger or warehouseman for delivery, and assented to by him—the change of mark on bales of goods in a warehouse, by direction of the parties—taking the vendee within sight of ponderous articles, such as logs lying within a boom, and showing them to him—selecting and marking of sheep by the vendee—have severally been held to be a sufficient delivery to complete the sale and pass the property. The delivery may be according

APPEAL from the district court of the county of San Joaquin. The material facts are stated in the opinion of the court.

John A. McDougall, (attorney general,) for the people.

D. W. Perlee, for the prisoner.

By the Court, BENNETT, J. The defendant was convicted of the crime of murder at the April term of the district court of the county of San Joaquin. An application was made to change the place of trial from that county to one of the adjoining counties, on the ground that the defendant could not have a fair and impartial trial in the county of San Joaquin. The application was supported by the affidavit of the defendant alone, who sets forth therein various reasons from which he is led to believe that a jury could not be selected from the citizens of *Stockton*, who would give him a fair and impartial trial. But Stockton does not constitute the whole of the county of San Joaquin, and it does not appear that an impartial jury could not have been selected from citizens of the county residing out of Stockton. The court was not satisfied that the prisoner could not have a fair trial in that county, and the decision of the district judge on this point was correct.

The defendant was indicted at the December term of the district court, and was ready for trial at that term, but the cause was put over on the application of the district attorney to the April term, when the defendant applied for a further continuance, the refusal of which, it is claimed, was error, for which the judgment should be reversed. But we think the affidavit of the defendant does not show a case, upon which the court could be required to grant a continuance. It does not show due diligence on the part of the defendant in endeavoring to procure the attendance of his witnesses, or their depositions in case their personal attendance could not be compelled. It does not appear at what time the subpœnas for the witnesses were taken out, at what time the witness known by the name of "Bones" left the county, what efforts were made to procure a service of

subpœna upon him, or that any attempt had been made to procure the testimony of Turner. The affidavit, it is true, states that Turner had promised to be in attendance, but the defendant should have taken some legal means to procure his evidence. Under these circumstances, the facts which were intended to be proved by these witnesses, should, at least, have been set out, in order that the court might judge of the materiality of their testimony. There was no error in the refusal of the court to grant a continuance.

Upon the other points in the cause, we also think the decision of the court was correct. We consider it a settled rule, founded upon considerations of necessary policy, that the testimony of a juryman cannot be received to defeat his own verdict. (4 *J. R.* 487; 5 *Hill*, 560; 4 *Binney*, 150; 5 *Rawle*, 61.) There was no case cited on the argument, and we know of none, which holds a different doctrine. The decision of the court refusing to grant a new trial on the affidavit of the juryman, made after the verdict and for the purpose of moving for a new trial, that he had formed and expressed an opinion before the trial, was in conformity with the law. The application of the rule is certainly no less necessary in criminal than in civil cases.

In relation to the charge of the court to the jury. There is no portion of the testimony, or facts proved at the trial, returned on this appeal; and it is impossible to determine whether the charge was correct or incorrect in reference to such testimony and facts. The instructions given would all be correct in certain cases; and we cannot say that they were incorrect in this. This was the view taken in the case of *The People* v. *McCauley* decided at this term, which was, in this respect, analogous to the present case. The judgment should be affirmed.

Ordered accordingly.

2 Cal. ...

THE PEOPLE *ex rel.* ALEXANDER CAMPBELL *vs.* CLARK.

Where a statute is declared to take effect *from and after its passage*, it takes effect at the very moment of its approval by the governor; and for the purpose of determining the right to an office, it is competent to inquire at what particular point of time in the day an act was approved by the governor. BENNETT, J. dissenting.

APPEAL from the district court of the district of San Francisco. The facts of the case were substantially as follows: The defendant was regularly elected county judge of the county of San Francisco, at an election regularly appointed and held in that county. On the day on which the election was held, the legislature, then in session, passed an act repealing the act by virtue of which such election was held, and conferred upon the governor the power to appoint the county judge. This repealing act was approved by the governor on the same day, but at what hour of the day did not appear. Some days after the election was over, the governor appointed the relator county judge. Both parties claiming the office, and both assuming to perform the duties of it, the relator filed a complaint in the district court in the nature of a *quo warranto*, and the cause was heard in the district court upon an agreed statement of facts. Judgment was there given in favor of the relator, and an appeal then taken to this court.

John A. McDougall, (attorney general,) for the relator.

Edward Norton, for the defendant.

By the Court, HASTINGS, Ch. J. Such is the unorganized condition of the county court of the county of San Francisco, that the immediate action of this court is required, and no opinion therefore has been prepared reviewing the numerous and conflicting authorities cited, and the arguments of counsel.

The right to the office claimed by the appellant by virtue of an election by the people, ought to be viewed favorably and not to be thwarted by any implication or fiction in the computation of time. The doctrine that a statute, by relation, was in force from the first day of parliament, and that the entire term of a court was but one day, and that judgments were to be considered as rendered on the first natural day of the term, has never been permitted to obtain in the courts of the United States, to the prejudice of the rights of the citizen or the public. If no time be specified when a statute shall be in force, it ought to go into effect from and after its passage, that is, from and after the *point* of time when its existence is perfected. This "rule is deemed to be fixed beyond the power of judicial "control, and no time is allowed for the publication of the law "before it operates, when the statute itself gives no time." Pick, 494, 496 (1 *Kent's Comm.* 457.) The general rule seems to be, that in the computation of time from an *act* done, the day of the act is to be computed, although in the computation from and after a day specified, the day shall be excluded.

To hold that a law operates all that part of the day of its passage prior thereto, is as absurd and as much of a fiction as the old doctrine that, by relation, it should commence running on the first day of the parliament. And if a statute shall go into effect from and after its passage, that is, from and after the point of time when it received the approval of the executive and became thus a law, it would be equally as irrational and as much a fiction to imagine that it did not really become a law until the next day.

The time of the approval of the executive is a fact which can be ascertained and proved, and, in all cases, where the rights of parties are in any manner to be affected by the time of the approval, an investigation of the question, when did the event—the passage of the act—occur, should be had. In the matter of *Richardson et al.*, (2 *Story's Rep.* 580,) in which precisely the same question was under the consideration of the court, Judge Story says, "On the contrary, it appears to me "that in all cases of public laws, the very time of the approval

"constitutes the guide as to the time when the law is to have "its effect." "It may not, indeed, be easy in all cases to as- "certain the very *punctum temporis;* but that ought not to "deprive the citizens of any rights created by antecedent laws, "and vesting rights in them. In cases of doubt, the time "should be construed favorably for the citizens. The legisla- "ture have it in their power to prescribe the very moment *in* "*futuro*, after the approval, when a law shall have effect; and "if it does not choose to do so, I can perceive no ground why "a court of justice should be called upon to supply the defect. "But, when the time can be accurately and fully ascertained "when a bill was approved, I confess that I am not bold "enough to say that it became a law at any antecedent period "of the same day."

When public justice requires it, the exact time in the day at which the act was performed may be shown by proof. (*Brainard* v. *Bushnell*, 11 *Conn. Rep.* 17, *cited in a note to 4th Kent*, 95.) In the case at bar the question is, at what time of the day was the statute repealed; before, or after, the electors had made their choice. If before, the election was void. If after, the incumbent secured a right of which the legislature did not deprive him by the repeal. Until the question is settled, every presumption should be in favor of the right of the people to elect, and it will be presumed that the repeal did not occur until after the choice had been made. Inasmuch as by the agreed statement of facts, it is provided that the time of the passage of the act may be ascertained on a new trial, if deemed necessary by this court, the judgment of the court below is reversed, and a new trial awarded; and if it shall be found that the repealing statute took effect on the day of the election, and before the voting had terminated, then a judgment should be rendered against the appellant.

Bennett, J. (dissenting.) Where a question arises as to when an act of the legislature takes effect, the day should be held to be indivisible, and where an act is declared to take effect *from and after its passage*, it does not take effect until

the next day after its passage. A new trial should not be granted, but judgment final should be rendered in favor of the defendant.

New trial granted.

SMITH vs. CHICHESTER.

A judgment rendered by a district court after the time appointed by law for its adjournment is invalid, and will be reversed on appeal.

APPEAL from the district court of the ninth judicial district. The facts are stated in the opinion of the court.

By the Court, HASTINGS, Ch. J. The judgment in this case was rendered by the district court of the ninth judicial district for the county of Bute, on the 19th day of December, A. D. 1850, upon the report of a referee, who was appointed by an order of that court made on the 15th day of November previous.

By the provisions of the Act entitled "An Act to organize "the district courts of the state of California," passed March 16th, 1850, the terms of the district court for each county in the several districts are to commence on specified days, and "may "continue until the day fixed for the commencement of some "other term in the district;" and, by the provisions of the same Act, as amended by the Act for that purpose passed April 18th, 1850, the terms of the district court for the county of Bute are to commence on the first Mondays of April, July and October, and the terms for the county of Shasta on the third Mondays of the same months. The October term for the county of Bute could, therefore, only continue until the third Monday of the same month, that being the day fixed by law for the commencement of a term of the court for the county of Shasta; and as the next term for the county of Bute was not to commence until the first Monday of the ensuing April, it results

that, at the time the order of reference was entered, and also at the time the judgment was rendered, there could have been no legal term of the court for the county of Bute. The judgment must, therefore, be reversed, and the order of reference and all subsequent proceedings be set aside, and a new trial awarded. The costs to abide the event.

Ordered accordingly.

HEATH *et al.* *vs.* LENT, Administrator, &c. *et al.*

In an action on a bond given on suing out an attachment against the property of a debtor, who was a merchant, where the sheriff had levied on no property except real estate, and the debtor had never been disturbed or molested in the possession of the real estate; *Held*, that evidence as to the general effect of an attachment upon the credit and reputation of merchants, ought not to have been submitted to the jury, on the ground that damages resulting therefrom are too remote and contingent; and *Held* further, that counsel fees paid by the attachment debtor in the defense of the suit commenced by the writ of attachment, over and above the taxable costs, were not recoverable, and that the district judge erred in refusing, when requested, to instruct the jury to that effect, after having admitted evidence of the amount of such counsel fees.

In an action on an attachment bond, it is improper to admit evidence of depreciation in value of real estate attached. *Per* HASTINGS, Ch. J.

IT *seems*, that a verdict for $3000, in a suit on an attachment bond, where no property has been levied on under the writ of attachment except real estate, in the possession of which the debtor has not been disturbed, will be deemed excessive, and reversed on that ground.

Where, in an action against an administrator, the complaint is founded on an instrument alleged to have been executed by the intestate, it is not necessary, under the statute, that the administrator should deny the signature of the intestate on oath. It must be proved.

The misjoinder of plaintiffs may be corrected by amendment, where a new trial is granted, on such terms as the district judge may deem just: So *held*, in an action brought by two persons as co-plaintiffs on an attachment bond, where it appeared that the property of only one of them had been seized under the writ of attachment.

APPEAL from the district court of the county of San Joaquin. All the material facts are stated in the opinion of the court.

Wm. Smith, for plaintiffs.

Mr. Perlee, for defendants.

By the Court, HASTINGS, Ch. J. The respondents brought this action on an attachment bond executed by Belt & Owens, as principals, and B. S. Knapp, deceased, as surety. Administration was had of the estate of Knapp, by the public administrator, who was made a party defendant. Afterwards, Lent, having been duly appointed administrator, was substituted for the public administrator, as a defendant. The respondents recovered a judgment against the defendants for the sum of $3000, a verdict having been rendered for that amount by a jury. A motion to set aside the verdict and grant a new trial was overruled. The record contains the testimony as taken by the clerk, most of which was illegal, and should not have been permitted to go to the jury. The property attached was real estate. The possession of the owner of the property was not disturbed, and it is difficult to perceive how any thing further than nominal damages can be recovered for the injury caused by the attachment, as no damages could have accrued, except for the injury of which the writ of attachment was the direct and proximate cause. The cases cited by counsel, from 25 *Wendell, p.* 383, *and* 3 *Denio, p.* 246, support this position, and, if correct, it would follow that the damages were excessive. The signature of Knapp to the attachment bond should have been proved. The statute provides, that when a complaint or answer is founded on an instrument in writing, which is alleged to have been signed by the party, the signature shall be considered as admitted, unless denied by such party on oath. The party to be charged was the representative of the estate of the person whose signature appears on the bond. He had not signed the instrument, and could not deny upon oath its execution by the deceased. It is clear that the statute does not extend to any other parties than those who are alleged to have signed the instrument. Such parties are supposed to know the genuineness of their own signatures, but it would be unreasonable to

suppose that the representatives of a deceased party possess the same knowledge.

All the testimony in regard to the depreciation of real estate during the time when the attachment was in existence, and about the injury to the credit and reputation of the respondents, and of the general effect of an attachment upon the credit and reputation of merchants, ought not to have been submitted to the jury. Such injuries are too remote, and cannot be the immediate result of an attachment upon real estate, of which the possession is not taken on the writ.

In an action on a bond for damages accruing from a wrongful suing out of an attachment, counsel fees constitute no part of the damages. This is well settled in analogous cases, and the court erred in refusing so to instruct the jury. There are other illegal testimony and irregularities, which it is not necessary to examine, as it is evident the judgment ought to be reversed.

The misjoinder of the parties, both plaintiffs and defendants, can be corrected by amendment under the statute. If it appear in evidence that the property of but one of the plaintiffs was attached, then it would seem that he alone should be plaintiff. The direct injury, if any, was suffered by him, and he alone is entitled to the damages, if any should be recovered. If the co-plaintiff, whose property was not attached, has suffered in his good name and reputation by reason of the wrongful suing out, this is a consequence, not of the seizure of his co-plaintiff's property, but of the facts stated in the affidavit for the writ, which, if true, or the affiant had good reason to believe to be true, will fully justify the issuing of the writ, and if the contrary, then the party will have a remedy, not upon the bond, but in the criminal code, or by his private action for the tort. The judgment is therefore reversed, and cause remanded.

FISHER *vs.* SALMON. 2 Ca. R. 138, 143

A *deed*, purporting to convey real estate, executed by an agent or attorney in his own name, instead of the name of his principal, is not binding upon the latter, and does not transfer the title to the property. *Per* HASTINGS, Ch. J.

An agent, authorized by power of attorney to wind up and adjust the affairs of a mercantile house in the city of New York, which had been conducted in the name of his principal, derives no authority from such power of attorney to bind his principal by a promissory note given on the purchase of real estate in the city of San Francisco. *Per* HASTINGS, Ch. J.

Where a promissory note was given on the sale of real estate, and the vendor had neither title, nor color of title, nor possession; *Held*, that as between the original parties, the consideration might be inquired into, and that, there being no consideration, the payee could not recover as against the maker; and, *held*, further, that the defendant, who had, as a part of the original transaction, and without consideration, guaranteed the payment of the note, was not liable to pay the same.

APPEAL from the superior court of the city of San Francisco. The facts are stated in the opinion of the court.

Nathaniel Holland, for plaintiff.

John Chetwood, for defendant.

By the Court, HASTINGS, Ch. J. This was an action on a guaranty of the appellant Salmon of the note of Katherine Salmon, drawn in favor of respondent for the sum of $24,000, dated November 2, A.D. 1849, and payable, one half in six months, and the balance in twelve months. Both the note and guaranty are between the original parties. The evidence discloses that the respondent was the attorney in fact of the non-resident heirs of one James Scott, deceased, and that the appellant was the attorney of Katherine Salmon, a resident of France, acting under a power of attorney, authorizing her attorney to settle certain mercantile business, and not giving him authority to make investments in real estate, or to do anything other than to wind up and adjust the affairs of a mercantile house in the city of

New York, which had been conducted in the name of Katherine Salmon. The consideration of the note was a deed of conveyance of certain lots in the city of San Francisco, executed by the respondent in his own name, representing that he was the attorney and agent of certain heirs, and was executed under his hand and seal, and not in the name of the principals. It is not necessary to cite authorities to show that such a deed is a nullity as to the principals of the agent Fisher, and the most that could be made of it, would be a mere contract on his part to procure a conveyance, but even as a contract it is not binding in law upon the principals.

It is equally clear that, as to Katherine Salmon, the note is also a nullity, her agent having no authority to execute such a note, so that, as between the principals respectively represented by the parties to this suit, the whole transaction was and is void. The contract, then, not being of any validity as against the heirs of Scott, nor as to Katherine Salmon, it results that the question of the liability of the agents of these parties, is to be investigated. Fisher was not the owner of the lots, did not bind the owners to convey, and could not convey in his own name, but Salmon guaranteed the payment of the note. The consideration of this guaranty was in substance the conveyance of the lots, which being invalid and void, it follows that there was not a good and sufficient consideration. But it appears that even the heirs have no title. They claim under deeds executed by an American Alcalde in 1847, when the United States were at war with Mexico. Such grants have been holden to be nullities by this court. (*See Woodworth* v. *Fulton et al.*, *ante*, *p.* 295.) The heirs were not in possession, and at the time of the contract of sale to Katherine Salmon, the property was unimproved, and in a wild and uncultivated state. There was then no valid consideration for the guaranty, and it is unnecessary to summon the authorities cited on the argument in support of the principle, that under the circumstances of this case, the consideration may be inquired into, and that the note and guaranty, for reasons above stated, are void.

The judgment is, therefore, reversed.

CRAIG *vs.* GODFROY *et al.*

The memorandum required by the Statute of Frauds to be entered by an auctioneer in his sale book, must be made at the very time of the sale, or the vendee will not be bound by the contract; So *held*, in a case where the sale at auction took place in the forenoon, and the memorandum was not made by the auctioneer before the evening of the same day.

The memorandum of an auctioneer is looked upon as a contract between the vendor and vendee reduced to writing, and executed by their mutual agent, who ceases to be such agent after the sale is closed.

Where the rights of parties are concerned, a day will not be considered a unit, but inquiry may be made as to the very point of time when an act was done.

APPEAL from the superior court of the city of San Francisco. The only fact necessary to be stated, which is not mentioned in the opinion of the court, is, that the sale by the auctioneer took place in the forenoon.

Calhoun Benham, for the plaintiff.

Hall McAllister, for the defendants.

By the Court, HASTINGS, Ch. J. The liability of the defendants depends upon a construction of the Statute of Frauds, in relation to sales by auctioneers, in favor of the validity of whose sales it is enacted as follows: That the "auctioneer shall at the "time of sale enter in a sale book a memorandum, specifying "the nature and price of the property sold, the terms of the "sale, the name of the purchaser, and the name of the person "on whose account the sale is made," &c. The name of the person on whose account the sale was made, was not written in the sale book until the evening of the day of sale, or during the next day. The memorandum then was not made at the time, and therefore the sale was not binding. This objection is not merely technical. The memoranda of auctioneers are the substitutes for contracts, reduced to writing, and signed by the par-

ties. The auctioneer is the agent of each party at the time of the sale, and not afterwards. On the part of the defendants this contract was not executed until after the sale was closed. The auctioneer then had no authority to bind the defendants, by signing their name to the contract, or entering it in the sale book, which in effect is the same thing. The case of *Hicks et al.* v. *Whitmore*, (12 *Wendell*, 548,) cited by counsel, is precisely similar to this case, and settles the question, the statute of New York being the same. The court held in that case, that a memorandum entered in the name of the person on whose account the sale was made, but one hour after the sale, would not bind the vendor. It is therefore unnecessary to examine the other points of the appellants, believing the sale to be void for the reason above stated.

Respondent contends, that inasmuch as a day is to be considered a point of time, therefore, if the memorandum was made during the day, it was made at the time of the sale. Most of the fiction about time, and the computation of time, is not now recognised as law, and especially by this court, as in the case of *The People ex rel. Campbell* v. *Clark*, (*ante*, *p.* 406,) we held that a day is not to be considered a unit, to the prejudice of the rights of a party, and that an examination should be had of the very *point of time*, when an act was done, as the approval of an act of the legislature by the executive.

The judgment is reversed.

BURT *et al.* *vs.* SCRANTOM *et al.*

Where suit is brought against a person in a county other than that in which he resides, he has thirty days within which to answer, exclusive of the day on which the summons is served, and a judgment by default before the expiration of the full time, will be reversed on appeal.

APPEAL from the district court of the ninth judicial district. The facts will be found in the opinion of the court.

By the Court, Hastings, Ch. J. This action was commenced on the 8th day of March A.D. 1851, in Bute county, ninth judicial district, the plaintiffs being residents of this county, and the defendants residents of Sacramento county. The summons was issued on the 10th day of March and was served on the 12th. The answer was filed on the 14th day of April; and the term of the court commenced on the 9th day of April. The defendants had thirty days after the service, within which to answer. The default was taken on the 11th day of April, which was irregular, as thirty days had not elapsed excluding the day of service. A jury was afterwards called, who found a verdict for plaintiffs, and final judgment was entered accordingly. These proceedings were also irregular, as the trial could not be had under the 23d and 27th Rules adopted by the supreme court for the government of the district courts. The judgment is therefore reversed, and the cause remanded for a new trial.

Webb *et al. vs.* Winter *et al.*

The consignee named in a bill of lading is to be deemed, *prima facie*, the owner of the goods mentioned therein, and upon payment of freight, may maintain an action against any person who assumes a control over them in violation of his right of property.

A merchant of Baltimore shipped to the plaintiffs at San Francisco certain goods by a bill of lading in which they were named as the consignees, and which required the delivery of the goods to them, on their paying freight. On the arrival of the ship at San Francisco, the defendants, who were the general consignees of the vessel, indorsed on the bill of lading an order to the master to deliver the goods to the plaintiffs, and afterwards indorsed on a duplicate bill of lading an order to the master to deliver the same goods to D. & H. The latter bill of lading being first presented, the goods were delivered to D. & H. *Held*, in an action brought to recover the value of the goods, it appearing the plaintiffs had paid the freight, or tendered payment of it, that the property in the goods was vested in them, and that the defendants were liable for a conversion.

Appeal from the district court of the district of San Francisco. The facts are stated in the opinion of the court.

Elisha Cook, for the plaintiffs.

Mr. Botts, for the defendants.

By the Court, HASTINGS, Ch. J. Moore & Griffith, of Baltimore, shipped to the plaintiffs at San Francisco ten boxes and five trunks, being in all fifteen packages. By the bill of lading the goods were to be delivered to the plaintiffs. The defendants were the general consignees of the ship. On the arrival of the ship at San Francisco, the defendants indorsed on the bill of lading held by the plaintiffs an order to the master to deliver the goods to the plaintiffs.

Subsequently, another bill of lading for goods of the same description was presented to the defendants, by another party, and the defendants indorsed an order to the master to deliver such goods to Dall & Austin, the holders of the bill of lading last presented. The last bill was first presented, and the goods delivered according to the order of the defendants. The plaintiffs, on calling for their goods, found they had been delivered to Dall & Austin, and thereupon they brought suit against the defendants for the value of the goods. The goods were the property of the plaintiffs, and the freight having been paid, the consignees of the vessel, by their order, had surrendered them to the control of the owners, and they were subject to their order, and to the order of no other person.

The defendants had no greater right to take these goods and dispose of them to Dall & Austin than the other goods and chattels of the plaintiffs. There was a conversion for which the defendants are clearly liable. That they were the agents of the owners of the ship will not relieve them from such liability. The master of the ship, the owners, the person who received the goods, may all be liable for a conversion of the plaintiffs' property. (*See Angell on Com. Carriers, sec.* 324.)

The judgment is therefore affirmed.(*a*)

(*a*) Upon a motion for a re-hearing in the above case, the following opinion was given by

HASTINGS, Ch. J. I see no reason for granting a re-hearing. If, as stated in

Brown *vs.* O'Connor.

A grant of a 50 *vara* lot, at the *Mission Dolores*, made by a Mexican Alcalde in 1842, where the grantee took possession, enclosed the lot, and built a house thereon, is a title under which a party may recover possession as against one who claims under a lease executed by the priest of the *Mission* in 1849. It *seems*, that the priest had no authority to lease lands appertaining to the *Mission* after the cession of California to the United States, and that a title thus derived is invalid.

The principle of the cases of *Suñol* v. *Hepburn*, (*ante*, *p.* 252,) and *Woodworth* v. *Fulton*, (*ante*, *p.* 295,) approved.

The case of *Reynolds* v. *West*, (*ante*, *p.* 322,) affirmed.

Appeal from the district court of the fourth judicial district. The facts of the case are stated in the opinion of the court.

Lorenzo Sawyer, for plaintiff.

John B. Weller, for defendant.

By the Court, Hastings, Ch. J. This was an action originally instituted before the court of First Instance of San Fran-

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the papers for the motion, the action was upon a contract and not a tort, then certainly the case is with the plaintiffs, for they have the right to waive the tort and sue in *assumpsit* on an implied contract to pay the value of the goods—but the plaintiffs complain of a conversion. In their complaint, they distinctly aver that the defendants had converted the goods by delivering them or ordering them to be delivered "to some other person." In the petition for a re-hearing it is stated that the complaint sets forth no cause of action, because it alleges no property in the goods. The complaint, the bill of lading, and the agreed statement of facts, show that Moore & Griffith shipped the goods to plaintiffs, to be delivered to them upon the sole condition of payment of freight. The presumption therefore is, that they were the owners of the goods, having the right of property in them. And from the indorsement on the bill of lading by the defendants of the order to the master, it is to be presumed the freight was paid. The statement of facts shows that the freight was tendered, so that they had the right of possession. There is no evidence that any other person was the owner of the goods, nor is it even averred in the pleadings that such was the fact. The general consignees of the vessel had no right to dispute the right of the plaintiffs to the immediate possession. They should have been governed by the bill of lading first presented.

Motion denied.

cisco for the recovery of possession of a 50 *vara* lot at the *Mission Dolores.* It appears from the evidence that on the 12th day of October, 1842, Francisco Sanchez, then Alcalde of the district of San Francisco, on the petition of plaintiff, granted the premises in controversy; that plaintiff enclosed the same by a fence and erected a house thereon; that afterwards, the fence having decayed, the premises were more permanently enclosed by one Leidesdorff, deceased, by and with the consent of Brown. That the premises have generally been denominated "Brown's Lot." The defendant claims under a lease executed in the year 1849 by José Prudencia Santillan, the then Padre of the *Mission Dolores*, and also by virtue of his settlement and occupancy, setting up that the premises were the property of the government of the United States, and that he cannot be legally ousted but by authority and action of the general government, claiming that Brown never complied with the conditions imposed in his grant, and that the premises were vacant and unoccupied at the time he took possession. It appears from the testimony of Santillan that, at the time he executed the lease, he did not know that the premises had been granted, nor does it appear that the priest had any authority to lease the premises. This case is similar to *Reynolds* v. *West* decided in this court. (*Ante*, *p.* 322.) In that case we held that an Alcalde, before the acquisition of California, had authority to make grants and concessions of land not exceeding 50 *varas;* and from the authorities cited in that case, (*Strother* v. *Lucas*, 12 *Pet.* 410, 437, and *United States* v. *Arredondo et al.*, 6 *Pet.* 691,) we there held that until the contrary be shown, it is to be presumed that an officer, under a foreign government, in the course of his ordinary or accustomed duties, acts within the sphere of his duties. Applying the principles decided in the case of *Reynolds* v. *West* to the facts of the present case, it inevitably follows that the plaintiff ought to recover as against the defendant. Although the evidence in some things is contradictory, yet there was testimony, first, of a grant made to plaintiff; second, of possession taken; and third, of the erection of a fence and a house on the premises. The defendant claims under naked occupancy; there

being no title or color of title in Santillan the Padre of the *Mission*, who executed his lease. The plaintiff had a grant which, if defective, afforded him a colorable claim of title, and having had possession under it, and never having abandoned it, but on the contrary by himself or his agents, or persons holding under him, having at all times claimed the premises as his own, it follows that he had a right to recover as against the defendant or any other person who could not set up a superior legal title. (*See cases cited and authorities referred to in the case of Woodworth* v. *Fulton et al., ante, p.* 295, *and Suñol* v. *Hepburn et al., ante, p.* 254.) This case was removed from the court of First Instance to the district court and tried before a jury, who found for the plaintiff. It has been repeatedly held in this court that a verdict of a jury will not be disturbed because the weight of testimony seems to be against the verdict. However defective then the title of the plaintiff may be, there was testimony tending to show that he was in the prior peaceable possession of the premises, and it is to be presumed that the jury found that the plaintiff had the prior and best right to the possession. It does not appear that the jury were misled by any erroneous instruction of the court, nor by the refusal of the court to give the instructions asked by the defendant. There are many questions suggested upon an examination of this record which have been fully settled in former cases decided in this court. By reference to those cases it will be seen that the judgment in this case ought to be affirmed.

The judgment is therefore affirmed.

DAVIS *vs.* GREELY *et al.*

Though interest is, as a general rule, not recoverable except by virtue of statutory regulations, a small rate may be allowed in some cases by way of damages. So *held*, where a referee, to whom a cause had been referred by consent of parties, had allowed the plaintiff interest at the rate of six per cent. per annum on the balance of an account found due to him.

***Query*? Was not that the rate of interest fixed by the decrees of the Mexican republic at the time of the occupation of California by the Americans.**

APPEAL from the district court of the fourth judicial district. The whole case is stated in the opinion of the court.

By the Court, HASTINGS, Ch. J. By consent of the parties, this case was referred to a referee. The case required the investigation of accounts. The referee reported upon the evidence, documentary and oral, and the only exception to his report which can be reviewed by this court, is the allowance of interest on the balance found for plaintiff of six per cent. per annum from the period specified in the report. Interest is generally regulated by statute, but, in the absence of any statute, has been allowed by way of damages. From this it is not to be inferred that an extraordinary rate of interest shall in any case be permitted, but that, in the absence of statutes, as a rule for equitably adjusting the amount of damages, the usual annual rate of interest may be adopted. The amount of interest allowed by the referee is small, the rate being six per cent. per annum. This, we believe to have been the legal rate of interest of the Mexican republic at the time of the organization of the state government.

The evidence is not set out in the report so as to make the error, if any, apparent. We think, therefore, that the district court properly refused to set aside the report of the referee. The judgment is therefore affirmed.

Ordered accordingly.

Brown *vs.* Howard & Howard.

Where it appears *clearly* from a charter-party, that the intention of the owner of the ship and the charterer is that the former shall have no lien on the freight, but shall give a personal credit to the charterer, the former loses his right of lien on the cargo, and can look only to the personal responsibility of the charterer for the payment of the hire of the vessel.

Thus, where it was agreed in a charter-party, that a vessel should be chartered for fifteen months, at 2000 dollars per month, to be employed in the Pacific trade, and that the payments for the hire of the vessel should be made semi-annually in the city of New York; *Held*, that the owner of the vessel had lost his right of lien on the cargo for the non-payment of the sum stipulated in the charter-party.

Appeal from the district court of the district of San Francisco. The facts are stated in the opinion of the court.

Allen T. Wilson, for the attaching creditor.

Ogden Hoffman, Jr., for the interpleader.

Horace Hawes, for the defendants.

By the Court, Hastings, Ch. J. The plaintiff Brown brought a suit against the defendants Howards in the district court of the fourth judicial district, to recover a sum of money, alleged to be due from the defendants to plaintiff, and sued out an attachment under which the sheriff of San Francisco seized a quantity of coal on board the ship *Orphan*. Soon thereafter, one Tyson, by virtue of section 37 of the statute entitled, "An Act to Regulate Proceedings against Debtors by Attachment," interpleaded in the suit, claiming to have a lien on the coal for the hire of the ship. Plaintiff filed an answer denying that Tyson had any lien on the coal, and the cause came on for trial on the 16th day of January last on this issue, and judgment was rendered to the effect that Tyson had such lien. Brown appealed to this court, and the question now is, whether, under

the state of facts appearing before the district court on the trial, Tyson had the lien. If he had, the judgment must be affirmed; if not, it must be reversed.

This question must be determined by an examination of the charter-party set out in the interpleader, and proved on the trial. By that, Tyson let the ship *Orphan* for fifteen months to the Howards, (and they were at liberty to keep her nine months longer on the same terms,) at the rate of two thousand dollars per month, payment to be made semi-annually in New York. By the charter-party, the time commenced running when the ship was ready to load in England, from which she was to proceed to some port in the Pacific Ocean, where she was to be employed until the close of the term, 15 months or two years, as the charterers should elect. The vessel was to be returned to New York or England. A right to detain goods until the freight thereon is paid, which is the lien claimed in this case, grows out of the usage of trade. (*Chandler* v. *Belden*, 18 *Johnson's Rep.* 157.) Although a part of the law laid down in the above case has been in effect overruled, yet the principle above announced has never been questioned. Where there is a known usage of trade, persons carrying on that trade are held to have contracted in reference to the usage, (unless the contrary appear,) and the usage forms a part of the contract. Hence it is evident that a lien, if any exist, is the result of a contract, and if, taking the usage of trade and the stipulations of the charter-party into consideration, it can be fairly inferred that the parties to the charter-party intended that the ship owners should have the right to retain the goods, until the lien of the ship should be paid, as security for such hire, then Tyson has the lien. If they did not so intend, then the lien does not exist. That this is the true doctrine is evident from the opinion of Tindal, chief justice, in the case of *Belcher* v. *Cooper*, decided in 1842, (*English Com. Law Rep. vol.* 43, *page* 262,) where, after an examination of the cases, the right of lien is made to turn upon the question, whether the parties to the charter-party "intended that a personal credit should be given to the charterer for the payment of the hire of the vessel," or "whether a

"right of stoppage of the goods was intended to be reserved to "the owners, as security for the pay of the contract price." (See also, *Abbott on Shipping*, 299; *Angell on Common Carriers*, *sec.* 386, 387–8–9.) In section 388, the case of *Pinney* v. *Wells*, (10 *Conn. Rep.*,) is cited, in which case the court held that, "if by the original contract made, the carriers waived any "lien for freight, and instead of leaving their payment to the "implication of law, they *contracted* to give a credit for the "freight, then, whether they had parted with the possession or "retained it, they must look only to the contract they had en- "tered into for their security." We think that by the terms of this charter-party it is evident that the owners looked to the personal responsibility of the charterers alone for their security, and not to the security that a right to retain the goods would afford.

The first voyage was to commence somewhere in England, and end at some port in the Pacific ocean, wherever the charterers should choose, and the subsequent voyages, as to *beginning*, *ending*, *and duration*, were uncertain. It would be unreasonable to hold that it was the intention of the parties, that as soon as the ship had arrived at the end of a voyage in some remote port in the Pacific ocean, the master should refuse to discharge and deliver the cargo until information could be obtained from New York as to the prompt payment of the half-yearly instalments. We must infer, therefore, that Tyson, in letting the ship to hire, did so on the credit of the personal responsibility of the charterers. From the remote and uncertain service in which the ship was to be employed, payment on delivery of cargoes would have been inconvenient to all parties, and the time and place of payment were fixed without reference to the voyages of the ship, which we believe to be inconsistent with the right of lien set up by Tyson. We are therefore of opinion, that the ship owners can have no lien under the charter-party, and that so much of the judgment of the court below as declares such a lien to exist, should be reversed.

Ordered accordingly.

THOMPSON *vs.* MANROW. 2 Cal. R. 97

A certificate of exemplification of a judgment rendered in another state, when attested by the clerk under the seal of the court, and when the presiding judge of the court certifies that the attestation is in due form of law, is sufficient under the act of Congress of May 26, 1790, to sustain an action upon the judgment in another state.

A judgment was obtained against one John P. Manrow in the city of New York, and an action was brought upon the judgment against one John P. Manrow, in the city of San Francisco: *Held*, that the identity of the person was to be presumed.

APPEAL from the superior court of the city of San Francisco. The facts are stated in the opinion of the court.

————, for plaintiff.

John Chetwood, for defendant.

By the Court, BENNETT, J. The action was brought upon a judgment of the court of common pleas of the city of New York.

Two points are made by the appellants; one, that the certificate of exemplification is insufficient; the other, that there is no proof that the John P. Manrow sued here is the same John P. Manrow against whom judgment was rendered in New York. I think neither position tenable.

The exemplification of the record is attested by the clerk under the seal of the court, and the presiding judge of the court certifies that the attestation is in due form of law. This is all that is required by the Act of Congress of May 26, 1790. (*Peters' U. S. Statutes*, *vol.* 1, *p.* 122; 1 *Greenleaf Ev. sec.* 504 *to* 507.)

As to the second point. The authorities establish, that, *prima facie*, John P. Manrow, against whom the judgment in New York was obtained, is the John P. Manrow now sued. (*Cow. and Hill's Notes*, 1301, and cases there cited; 1 *Greenleaf Ev. sec.* 575 *in note.*)

Judgment affirmed.

Rogers *vs.* Huie.

Where a motion for a new trial is made on the ground that the party was taken by surprise at the trial by the non-attendance of witnesses, it should appear that the party had used reasonable diligence in endeavoring to procure the attendance of his witnesses at the first trial.

Where it did not appear that the defendant had made any efforts to have his witnesses subpœnaed, or to procure their attendance, until the morning of the day for which the cause was set down for trial, and on which it actually was tried; *held*, that the party had not used proper diligence, and that the decision of the district court, refusing a new trial, was correct.

Where a motion for a new trial is made on the ground of surprise, the affidavits on which the motion is founded, should set forth particularly and distinctly the facts which the party expects to be able to prove by his witnesses on a new trial; and *held*, where the affidavits did not set forth the facts to which the party expected his witnesses would testify, that a new trial was properly refused.

The affidavits of the witnesses themselves should, also, if practicable, be procured, setting forth the facts, within their knowledge, to which they can testify, in case a new trial should be granted. *Per* Bennett, J.

The same rules apply in case a new trial is asked for on the ground of newly discovered evidence. *Per* Bennett, J.

An auctioneer who receives and sells stolen property, innocently, and in the ordinary course of his business, is liable to the true owner for the conversion thereof; and that, too, without the previous prosecution and conviction of the felon, and although the auctioneer had paid over to the felon the money received on the sale of the goods, before notice that the goods had been stolen.

Whether an action could be sustained against the felon himself; *Query?*

Action of trover. The plaintiff alleges in his complaint that, on the 12th day of December, A. D. 1850, he was the owner of twenty-nine kegs of butter, of the average weight of twenty-five pounds each, and of the value of thirty cents per pound; and also of one hundred cheeses, weighing fifteen hundred pounds, and worth twenty cents per pound; and that the value of the butter and cheese together was five hundred and seventeen dollars. The complaint further alleged that the butter and cheese were taken away from the plaintiff without his knowledge and consent by some person or persons to him unknown, and passed into the hands of the defendant, an auctioneer in

II. The instructions asked by the defendant should have been given. An auctioneer who receives and sells property, in good faith, in the ordinary course of his business, is not liable for conversion of the property, in case it should turn out to have been stolen. An auctioneer is a public officer, licensed by the state, and is not individually liable.

III. A new trial ought to have been granted on the ground of surprise in the non-attendance of the defendant's witnesses. (6 *Mod. Rep.* 22; 11 *id.* 1; 14 *Johns. R.* 112; 2 *Johns. Cases*, 318.)

Mr. Noyes, for respondent. I. The defendant was liable for conversion, although he was an auctioneer, acting under a license from the state, in the ordinary course of his employment, and without notice that the goods were stolen. (*Hoffman* v. *Carew*, 20 *Wend.* 295; *and* 22 *id.* 317, *same case.*)

II. By the common law, the doctrine of merger was applicable only to actions brought against the thief, and not to actions against third persons. (13 *Mees. and Welsby*, 603; 6 *Barn. and Cress.* 564.)

III. The doctrine of merger of a private in a public wrong is not in force in this country. (*Plummer* v. *Webb*, *Ware's Rep.* 78.)

IV. The motion for a new trial was properly denied.

By the Court, BENNETT, J. The first point which I shall consider is, whether a new trial should have been granted; and this depends upon the question whether the affidavits on the part of the defendant, presented to the consideration of the district judge sufficient facts to require him to grant a new trial. The application ought not to have been granted, unless the defendant had used due diligence in endeavoring to procure the attendance of his witnesses. Did he use such diligence? I think not. His witnesses had not been subpœnaed, as appears from his own affidavit. Did he make reasonable efforts to have

them subpœnaed? I think not. He made no attempt to subpœna them, until the morning of the day on which the trial was to take place, and actually did take place. This was not using due diligence. For this reason alone the court properly denied the motion for a new trial.

There is also another defect in the papers upon which the motion for a new trial was made. The affidavits do not state the facts which the defendant expected to be able to prove by his absent witnesses. In all cases in which a new trial is moved for, on the ground of surprise, or on the ground of newly discovered evidence, the evidence which the party moving expects to be able to produce on the second trial, should be fully and distinctly set forth in the affidavits on which the application is based, in order that the court may see whether the testimony, if given, could have any legal effect on the result of the controversy. And, as a general rule, the party ought not to rely on his own single and unsupported statement, but should, if possible, by the exercise of due diligence, procure the affidavits of the persons whose testimony he deems material, so that the court may be satisfied as to what facts they will testify. (*Ruggles* v. *Hall*, 14 *J. R.* 112; *Hollingsworth* v. *Napier*, 3 *Cai. R.* 182; *Kendrick* v. *Delafield*, 2 *Cai. R.* 67; *Denn* v. *Morrel*, 1 *Hall*, 382.) In the case at bar it does not appear that the witnesses who were absent could have testified to any state of facts which would have influenced the result. The same reasoning also applies to that portion of the defendant's affidavit, in which he states that he has a good and substantial defense. He does not set forth specifically wherein that defense consisted. A new trial should never be granted on such a general statement. If this practice were to be sanctioned, there would be no limit to applications for new trials. The court properly denied the motion.

An auctioneer who receives and sells stolen property, is liable for the conversion to the same extent as any other merchant or individual. This is so both upon principle and authority. Upon principle, there is no reason why he should be exempted from liability. The person to whom he sells, and who has paid

the amount of the purchase money, would be compelled to deliver the property to the true owner or pay him its full value; and there is no more hardship in requiring the auctioneer to account for the value of the goods, than there would be in compelling the right owner to lose them, or the purchaser from the auctioneer to pay for them. As a general rule any person who assumes and exercises a control over the property of another, without right or authority, must respond in damages to the value of the property; and I see no principle of policy for the encouragement of trade, or for convenience in the transaction of commercial business, under which an auctioneer should be permitted to claim an exemption from the general rule.

Upon authority the case is clear. The very point was decided in *Hoffman* v. *Carew*, (20 *Wend.* 21; *and* 22 *Wend.* 285, *S. C.*) That case is in all respects analogous to the case at bar, and both the supreme court and the court of errors held the auctioneer liable. Senator Verplanck, in the court of errors, (22 *Wend.* 319,) speaking of the policy of the rule, uses the following language: "In this instance, the ruin falls hardly upon in-"nocent and honorable men; but looking to general considera-"tions of legal policy, I cannot conceive a more salutary regula-"tion than that of obliging the auctioneer to look well to the title "of the goods which he sells, and, in case of feloniously obtained "property, to hold him responsible to the buyer or the true owner, "as the one or the other may happen to suffer. Were our law "otherwise in this respect, it would afford a facility for the sale "of stolen or feloniously obtained goods, which could be remedied "in no way so effectually as by a statute regulating sales at auc-"tion, on the principles of the law as we now hold it."

Does the common law protect the defendant from an action, on the ground that the thief has not been prosecuted and convicted? In some of the American cases, the rule that a felony suspends all right of private redress, is said to rest on a salutary principle of public policy, being designed to stimulate to the prosecution of offenders. (*Foster* v. *Tucker et al.*, 3 *Greenl.* 458; *Boody* v. *Keating*, 4 *id.* 164.) In other cases it is treated as a technical rule, and it is doubted whether it exists at all in this

country, or at least to more than a very limited extent. (*Man. and Mech. Bank* v. *Gore*, 15 *Mass.* 78; *Boardman* v. *Gore*, *id.* 331, 335, *et seq.; Pettingill* v. *Rideout*, 6 *N. H.* 454; *Allison* v. *Bank*, 6 *Randolph*, 204, 223; *Piscataqua Bank* v. *Turnley*, 1 *Miles*, 312; *Plummer* v. *Webb*, *Ware*, 78.)

But this is not a case in which the common law doctrine that the civil action is merged in the felony, is applicable. The action is not against the thief himself, but against a third person, who, although innocently and in good faith, yet without right, has assumed to exercise a control over the property of the plaintiff. In *Stone* v. *Marsh*, (6 *Barn. & Cress.* 564,) Lord Tenterden says, "There is, indeed, another rule of the law of England, viz., that a man shall not be allowed to make a felony the foundation of a civil action; not that he shall not maintain a civil action to recover from a third and innocent person that which has been feloniously taken from him; for this he may do if there has not been a sale in market *overt;* but that he shall not sue the felon." In *White* v. *Spettigen*, (13 *Mees. & Wels.* 602,) the doctrine of Lord Tenterden was carried into an express adjudication. It was there held that an action of trover was maintainable to recover the value of goods which had been stolen from the plaintiff, and which the defendant had innocently purchased, although no steps had been taken to bring the thief to justice, on the ground that the obligation which the law imposed on a person to prosecute the party who has stolen his goods, did not apply where the action was against a third party, innocent of the felony. POLLOCK, C.B., says, "The court of king's bench correctly explained the law in the case of *Stone* v. *Marsh*, and the rule of public policy which prevents the assertion of a civil right, in respect of which a felony has been committed, applies only to proceedings between the plaintiff and the felon himself, or, at the most, the felon and those with whom he must be sued, and does not apply to a case like the present, where the action is brought against a third party, who is innocent of the felonious transaction." All the other judges expressed opinions the same in substance as that declared by Pollock, C. B. That case is decisive upon the point under consideration.

It only remains to add that no such thing as market *overt* is known to our laws. The judgment should be affirmed.

Ordered accordingly.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA,

IN JUNE TERM, 1851.

Dennison vs. Smith.

It is too late to object at the trial that a bill of particulars is not properly verified by the oath of the party. The party upon whom a bill of particulars is served, if he is not satisfied with it, either because it is defective in form or substance, or because it is not verified by the plaintiff, should immediately return it, or move the court for a further or amended bill.

It is too late to move for a new trial after the expiration of four days from the rendition of judgment, unless an order extending the time has been procured. 2 Cal, R. 95.98.

The facts are stated in the opinion of the court.

By the Court, Bennett, J. The defendant applied to the plaintiff for a bill of particulars of his demand. This was made out by the plaintiff's attorney, and served upon the attorney for the defendant, but it was not verified by the plaintiff as required by statute. The cause was referred, and upon the hearing before the referee, the defendant objected to any evidence being given by the plaintiff to prove the items specified in the bill of particulars, for the reason that the same was not verified by the oath of the plaintiff. The referee sustained the objection, and nonsuited the plaintiff. The court, on motion, set aside the report of the referee, and ordered the cause to be reinstated on the calendar.

The report of the referee was properly set aside. If the defendant was not satisfied with the bill of particulars, because it was defective, either in form or substance, or because it was not verified by the plaintiff, he should have immediately returned it, or moved the court for a further or amended bill. Having kept it in his hands until the moment of the trial, it was too late to object on the ground that it was not verified.

The cause was again tried, and judgment rendered in favor of the plaintiff on the 20th day of January, 1851. No order extending the time for the purpose of moving for a new trial was made; but on the 19th day of February, one month after the judgment was rendered, the defendant moved the court for a new trial. The motion was made at too late a day, and the court decided correctly in denying it. By our statute a motion for a new trial must be made within four days after judgment. (*Sec.* 252 *of Practice Act of* 1850.) The judgment must be affirmed.

Ordered accordingly.

In the Matter of Holdforth, on Habeas Corpus.

In a suit to recover money received by a person as agent, he cannot be arrested without showing some fraudulent conduct on his part, or a demand on him by the principal, and a refusal by him to pay. An arrest in such case is prohibited by section 15, Art. 1, of the constitution.

R. N. Morrison, for the petitioner.

John Chetwood, contra.

By the Court, Bennett, J. Holdforth was arrested in a civil action at the suit of one Cumlorey, upon an order founded on an affidavit, of which the following is a copy :—

"TUCKLER CUMLOREY *vs.* CHARLES G. HOLDFORTH.

"City and County of San Francisco, *ss:* Robert S. Watson "being sworn, says, that he is the agent and attorney in fact of "the above named plaintiff—That the above named defendant, "in the month of April, 1850, sailed from the port of Hong "Kong, in the empire of China, in the ship *Kelso*, bound for "the port of San Francisco, having in his charge as the agent "and factor of the plaintiff, a large amount of valuable mer- "chandise belonging to the plaintiff, and by him placed in charge "of the defendant for the purpose of sale in the market of San "Francisco—That on or about the first of June, 1850, the said "ship bringing with it the said defendant and the said merchan- "dise of the plaintiff, arrived in the port of San Francisco—That "shortly after his arrival the said defendant sold and disposed of "the said merchandise of the plaintiff, received from the various "purchasers thereof large sums of money, being the price paid "by them therefor—That the said defendant has not paid over "the said money so received by him as the agent of the plain- "tiff to the said plaintiff, but retains the same to the great "wrong and injury of the plaintiff.

"Sworn," &c.

The applicant claims that he is entitled to be discharged from arrest, on the ground that the affidavit sets forth no state of facts which would authorise an order of arrest. The affidavit shows only the fact, that Holdforth, the agent of the plaintiff, had received money in the capacity of agent, and had not paid it over. No circumstances are disclosed from which the inference can be drawn, that the defendant was guilty of any fraud either in procuring the merchandise, or in detaining the money received on the sale. It is not even alleged that a demand had been made, or that the defendant had refused to pay. The question, then, is, whether, in a suit to recover money received by a person as an agent, he can be arrested without any fraudulent conduct on his part, without any demand on him by the princi-

nexion with that which immediately precedes it, and with that which follows. In the paragraph preceding the one quoted, the following language is used: "It seems that by the common "law, the playing at cards, dice, &c., *when practised innocently* "*and as a recreation, the better to fit a person for business*, is "not at all unlawful, nor punishable as any offense whatsoever." And in a succeeding paragraph it is said: "Also all *common* "*gaming-houses* are nuisances in the eye of the law, not only "because they are great temptations to idleness, but also be-"cause they are apt to draw together great numbers of disor-"derly persons, which cannot but be very inconvenient to the "neighborhood." And it is laid down by Blackstone, that gaming-houses are public nuisances, and may, upon indictment, be suppressed and fined. (4 *Blackstone's Comm.* 168; see also to same effect, *Rex* v. *Rogier*, 2 *D. & R.* 431; 1 *B. & C.* 117; *Rex* v. *Taylor*, 3 *id.* 502.)

In *Petersdorff's Abridgment*, (*vol.* 10, *p.* 228,) the principle is thus stated: "By the common law, the playing at cards, "dice, &c., when practised innocently and as a recreation, "the better to fit a person for business, is not unlawful, but "when the playing is, from the magnitude of the stake, exces-"sive, and such as is now understood by the term gaming, it is "considered by the law as an offense, being in its consequences "mischievous to society." Oliphant, in his work on Horse Races and Gaming, (*p.* 209; 48*th vol. of Law Library*,) sets forth the same doctrine somewhat more at large, and the case there cited, in which Ch. J. Hale permitted the defendant, in an action for the recovery of a gambling debt, to *imparl* from time to time, without putting him to the necessity of pleading his defense, shows that, in his estimation, the action was, at least, an inequitable one, and such as a court of equity would enjoin. Judge Story, (1 *Eq. Juris. sec.* 303,) says, "In regard to gam-"ing contracts, it would follow, that courts of equity ought not "to interfere in their favor, but ought to afford aid to suppress "them; since they are not only prohibited by statute, but may "justly be pronounced to be immoral, as the practice tends to "idleness, dissipation, and the ruin of families. No one has

" doubted, that under such circumstances, a bill in equity might " be maintained to have any gaming security delivered up and " cancelled." A court therefore should not aid in enforcing gaming contracts further than is absolutely required by the strict letter of settled and unquestionable law. In *Petersdorff* and *Oliphant*, above cited, a distinction is made between games which are lawful, and games which are unlawful. That such a distinction existed at common law, can scarcely be doubted. The earliest English statutes speak of *unlawful games*, meaning, of course, those which were unlawful at common law. The distinction is between such, on the one hand, as are innocent and recreative in their design and effect, and such, on the other hand, as are pursued as a business and from motives of gain; and this distinction is said to be indicated by the amount at stake, or by the nature of the game. The former is the ground on which it is rested by Petersdorff, while Oliphant sustains it on both grounds. In the latter work, a list of each kind is given, not as exhausting the respective classes, but as presenting specimens indicative of the distinction. " Pharaoh " (*Faro*) is put down as an *unlawful game*.

In *Burling* v. *Frost*, (1 *Esp.* 235,) Lord Kenyon decided, that £3 10s., won at "*All Fours*," (*Old Sledge, or Seven up*,) might be recovered, declaring, however, at the same time, that " he had never known such an action brought before."

In *Robinson* v. *Bland*, (2 *Burr*, 1077,) it was decided, that money won in France was not recoverable in England, and that a bill for the amount drawn payable in England, would not support an action.

As has already been remarked, there is no direct authority in support of the action; and no action should be permitted to be brought to recover a gaming debt, unless it falls precisely within the line of adjudicated cases. And it appears to me that the action cannot be sustained even by the language of any of the writers above cited. From these authors I should draw the conclusion, First, that four thousand dollars, if won under any circumstances, at what is called, I believe, a *round game*, and in a private room, could not be recovered, because the

the case is presented to us upon affidavits, as in this instance, we must be satisfied that some real injustice has been done to the appellants.

I think the judgment should be affirmed.

MIDDLETON *et al.* vs. BALLINGALL *et al.*

Where the defendants stipulated to sell to the plaintiffs certain merchandise, "shipped" from Batavia, in the island of Java, for the port of San Francisco, and the parties agreed that the contract should be considered as binding until the arrival of the ship; *Held*, that the fulfilment of it on either side depended on the contingency of the ship's arrival, and that an action could not be maintained by the vendee of the goods, it appearing that the ship had never arrived at her port of destination.

The fair construction of such a contract is that, *on the arrival of the ship* containing the goods, the defendants should deliver them, and the plaintiffs should pay the contract price; and the arrival of the goods in such case, is a condition precedent, which must be shown to have taken place before either party can bring suit.

APPEAL from the superior court of the city of San Francisco. The facts are stated in the opinion of the court. The judgment of the court below was rendered in favor of the defendants.

Alexander Campbell, for the plaintiffs.

———————, for the defendants.

By the Court, BENNETT, J. I shall not consider whether the power of attorney from the defendants to Bell, authorized the contract upon which this suit is founded, inasmuch as I think the action cannot be sustained on the contract itself. The defendants stipulate to sell to the plaintiffs certain merchandise shipped from Batavia, in the island of Java, for the port of San Francisco, and both parties agree that the contract shall be considered as binding *until the arrival of the ship*. The ship has never arrived.

The sale was not an absolute and unconditional sale of the property. Even had the goods been shipped, the title to them

did not pass to the plaintiffs. The contract was executory, and the fulfilment of it on either side depended on the contingency of the ship's arrival. The action is brought to recover damages for the non-delivery of the goods, and not for a breach of a warranty, nor for fraudulent representations, nor for bad faith in preventing the arrival of the goods. Besides, I do not think that the word "shipped" in the contract can, in the connection in which it is found, be construed as amounting to a warranty that the goods had been shipped. It is rather used to describe and ascertain the property, which was the subject matter of the contract. I think that the fair construction to be put upon the contract is, that on the arrival of the ship containing the goods, the defendants should deliver them, and the plaintiffs should pay the contract price. And the authorities hold that the arrival of the goods, in such case, is a condition precedent, which must be shown to have taken place before either party can bring suit. (*Russell* v. *Nicoll*, 3 *Wend.* 112; *Boyd* v. *Skiffin*, 2 *Camp.* 326; *Chitty on Con.* 444, 445; *Story on Sales*, *sec.* 249.)

The judgment, therefore, should be affirmed.

Ordered accordingly.

In the Matter of the WESLEYAN COLLEGE.

On an application for the incorporation of a College, a cash subscription of $27,500, with the subscription list annexed to the petition, and accompanied by affidavits, showing that the subscribers are severally worth the respective sums set opposite their names, is a sufficient compliance with the Act of April 20th, 1850, to authorize this court to grant a charter of incorporation.

Mr. Merrill, for the application.

By the Court, BENNETT, J. The petition sets forth that the applicants have procured a cash subscription of Twenty-seven Thousand and Five Hundred Dollars, as the endowment for their institution. The subscription list is annexed to the petition,

and affidavits are presented showing that the subscribers are severally worth the respective sums set opposite to their names.

This we deem a compliance with the statute of April 20th, 1850, and an order will therefore be entered, declaring the trustees named in the petition duly incorporated under the name and style of "The President and Board of Trustees of the California Wesleyan College," with all the powers, rights and franchises conferred by that Act.

YOUNG *vs.* PEARSON *et al.*

Where a complaint filed to compel a partnership account, contained sufficient to call upon the defendants for an account as to a particular branch of their business, but was, in other respects, inartificially drawn and insufficient, and a demurrer was put in to the whole complaint; *Held*, that the demurrer must be overruled.

The law of Louisiana requires a partnership contract to be in writing—the law of California does not require it to be in writing; *Held*, that a verbal partnership agreement entered into in Louisiana, but which was to be executed in California, was valid.

APPEAL from the district court of the sixth judicial district. The demurrer which was put in to the complaint having been sustained by the district court, an appeal was taken to this court. The nature of the complaint and demurrer will be found in the opinion of the court.

By the Court, BENNETT, J. The complaint in this cause was filed for the purpose of compelling a partnership account. It sets forth numerous reasons and inducements to show how the plaintiff was led to embark in the proposed operations of the defendants, all which should have been stricken out by the court below as surplusage. It then alleges "that the copartnership "was formed, as will be fully proven on the trial," but does not state for how long a time it was to continue, or in what proportions the parties were to bear the losses or receive the profits of the concern. It says that "it was settled at what time he (the

" plaintiff) should join the defendants in California," but does not allege that he joined them within that time, or give any reason for not doing so. The nearest approach to this is the allegation that on the 11th day of May, 1850, as soon as his business in New Orleans could be closed, he embarked to join his partners in California, and arrived here on the 6th day of July. On his arrival he was informed by his associates that he was no longer considered as a partner, and the complaint charges that he " then demanded a settlement of the whole partnership " transactions, according to the original agreement of partner- " ship," but does not give the slightest intimation as to what that original agreement was. It then charges that the defendants have been purchasing and trading in land, and that they have realised from their business a large sum of money, which should be considered as partnership property, and that such land was purchased on partnership account, without alleging that it was purchased with partnership funds. It further charges that the plaintiff furnished five hundred dollars in cash, besides tools and machinery and goods, before his associates left New Orleans, for the purpose of starting the partnership business, and that such property has been sold by the defendants, and that the proceeds thereof, together with the money advanced by the plaintiff, have remained in the hands of the defendants, they refusing to account therefor. A demurrer was put in to the whole complaint.

The complaint is very inartificially drawn, but I think it contains sufficient substance to call upon the defendants to account for the advances made by the plaintiff in money and goods and machinery. That is enough to sustain the complaint against the demurrer. The demurrer goes to the whole complaint, and if any real cause of action is set forth therein, it is in substance sufficient. Whether the complaint is sufficient to call upon the defendants to account for the land which they hold, or the profits which they have made out of land operations, it is not necessary now to determine. One of the grounds of demurrer is, that it is not alleged in the complaint that the real estate was purchased with partnership funds for partnership pur-

poses. If this objection covered the whole complaint, it would be necessary to consider it. But as it goes to a part only, it is not.

The other ground of demurrer covers the whole case, but the position assumed therein is not tenable. Whatever the law of Louisiana may be, the law of California does not require that a partnership agreement should be in writing. The partnership business was to be prosecuted here, and the contract must be governed by the laws of this state. It is no objection, therefore, that the contract was not in writing.

The demurrer is overruled, and the cause remanded for trial, or for such other disposition as the district court shall see fit to make of it.

Ordered accordingly.

De Briar *vs.* Minturn.

Where no definite period of employment is agreed upon between a master and servant, the master has a right to discharge the servant at any time, and to eject him by force from his house in case the servant refuses to leave, after having received notice to that effect. But in such case, no more force should be used than is necessary to accomplish the object.

Where the servant sued the master in such a case, and the jury gave a verdict in favor of the plaintiff for $600; *Held*, that no more than nominal damages should have been given, even if the action could be sustained at all, and a new trial was accordingly granted.

Appeal from the district court of the third judicial district, where judgment was rendered in favor of the plaintiff. The facts will be found in the opinion of the court.

Alexander Wells, for the plaintiff.

Mr. Tingley, for the defendant.

By the Court, BENNETT, J. The defendant was an innkeeper. He employed the plaintiff as a barkeeper, and was to give him three hundred dollars per month for his services, and allow him the privilege of occupying a room so long as he remained in the plaintiff's employ. The plaintiff was not hired for any definite period, and he was discharged by the defendant. After such discharge, the defendant notified the plaintiff to leave the room which he occupied, at the end of the month. The plaintiff did not comply with the notice, and the defendant put him out of the house by force; and this action is brought to recover damages for being thus ejected. The jury rendered a verdict in favor of the plaintiff for six hundred dollars.

We do not see how any action can be maintained upon the facts presented. The plaintiff had no right to remain in the defendant's house after being notified to leave, and the defendant had a right to eject him. It does not appear that any more force was used than was necessary, or that the facts would warrant any thing more than nominal damages, even if an action could be sustained at all. We think a new trial should be granted.

Ordered accordingly.

RAY *vs.* THE BARK HENRY HARBECK.

The case of the *Sea Witch*, (*ante*, *p.* 162,) affirmed.

By the Court, BENNETT, J. The *Henry Harbeck* was not a vessel used in navigating the waters of this state, within the meaning of the act known as the Boat and Vessel Act. The case falls directly within the decision of this court in the case of the *Sea Witch*. The vessel was used in navigating the high seas, and not the waters of this state, any farther than by entering the harbor of San Francisco from the ocean. It was held

amount is so large as to be excessive; Second, that the fact of its being won at a *bank game*, such as *Faro*, makes its recovery unlawful; and, Third, that its being won at a common gaming-house, by the owner and keeper thereof, would alone bar the recovery; for it would be strange, that the law should punish the prosecution of a particular business in a certain way, *criminaliter*, and should, at the same time, lend its aid to enforce contracts *civiliter*, which should be made for the furtherance and prosecution of such business.

But the counsel for the plaintiff cites the statutes of California, which permit the keeping of a gaming-house, after a license granted for that purpose. It is a sufficient answer to this, *to* say, that it does not appear that the plaintiff had taken out such license. But even if he had, it would not have influenced my opinion, for such license should not be construed as conferring a *right to sue* for a gaming debt, but as a *protection* solely against a criminal action.

For the above reasons, if there were no other, I think the judgment should be affirmed; but there is a broader ground upon which the case should stand. Wagers, which tend to excite a breach of the peace, or are *contra bonos mores*, or which are against the principles of sound policy, are illegal; and no contract arising out of any such illegal transaction, can be enforced. These are principles of the common law which has been adopted in this state; and whatever may have been the application of these principles in particular cases in England, I entertain no doubt, either of this case falling within their operation, or of the propriety of applying them in this and all similar instances.

Judgment affirmed.

SMITH vs. THE PACIFIC MAIL STEAMSHIP CO.

Where the record of a court of First Instance, returned on appeal, is imperfect, the court will, under the statute of Feb. 28th, 1850, receive affidavits and counter affidavits, for the purpose of ascertaining whether injustice has been done by the court of First Instance; but, when the case is presented upon affidavits, the court will not reverse a judgment, unless it is satisfied that some real injustice upon the merits has been done to the appellant.

APPEAL from the court of First Instance of the district of San Francisco. The record returned in this case was very imperfect, and the defects were attempted to be supplied by affidavits. The affidavits on one side were directly contradictory to those presented on the other side, and it did not appear from the affidavits of the appellants, that injustice had been done to them on the merits.

Allen T. Wilson, for plaintiff.

Hall McAllister, for defendants.

By the Court, BENNETT, J. No error appears on the record in this case, for which the judgment ought to be reversed. This cause being an appeal from a judgment of the court of First Instance, we should feel authorized, under the statute of Feb. 28th, 1850, to reverse it, if it had been shown clearly by the affidavits that injustice had been done upon the merits. The court during the progress of the trial discharged some of the jury, and continued the trial before the others. The record does not show that any objection was made by the defendants to this proceeding, but the defendants now come in, and say, by affidavits, that an objection was made, and ask that the judgment may be reversed for that reason. But they do not show that the facts of the case made out by the evidence do not fully warrant the verdict of the jury and the judgment of the court. Before we should feel called upon to reverse a judgment, when

height with a new wharf which the plaintiff was building next adjoining on the north. The defendant McCarthy, being the street commissioner of the city of San Francisco, and the other defendant by his orders, compelled the plaintiff to desist by force, but used no more force than was necessary to effect that object. The plaintiff owned the land adjoining the wharf on the north, and one question made at the trial was whether the spot, at which he was at work, was on his own land or on that portion of the wharf which was in the street. We must presume the latter under the verdict of the jury. The plaintiff then was removing planks and cutting off the piles of a public wharf at the foot of one of the public streets. I think the street commissioner had the right to use the necessary force to prevent any injury to the wharf, which was, in truth, but a continuation of the street. The wharf had been built of a certain height, and it was not for the plaintiff to say whether it was too high or too low. If he wished the grade altered he should have applied to the proper authorities. It will not do, to permit every individual to determine for himself, whether the grade of a street or a wharf is too high or too low, and, if he be dissatisfied with it, to set about altering it. This case differs from the case of the *City of San Francisco* v. *Clark*, (*ante*, *p.* 386.) In the latter, the defendant was doing the only thing by which a street could be made susceptible of use, which was before impassable. Here, the plaintiff was doing an act that rendered a street impassable, which the public was daily using.

I think, therefore, that the portion of the charge of the court by which the jury were instructed, that, if the wharf in controversy was a continuation of Broadway street, it was the duty of the street commissioner to protect it from injury, was well enough. That portion of the charge instructing the jury that, if the *city had an interest in the wharf*, it was the duty of the street commissioner to protect it from injury is, as an abstract proposition, too broad; but so far as it has any applicability to the facts of this case, could not, I apprehend, have affected the verdict of the jury one way or the other.

The facts on which my opinion is based are briefly these :—

A public street in daily use as such—the plaintiff actually engaged in doing an act which entirely deprived the public of the easement—the defendant McCarthy, as street commissioner, interfering to prevent the continuance of the plaintiff's proceedings, and using no more force than was necessary to accomplish that object. I think the judgment should be affirmed.

Ordered accordingly.

WEBER *vs.* THE CITY OF SAN FRANCISCO *et al.*

Where an assessment is laid upon land in the city of San Francisco, it is not within the province of a court to interfere and order a sale of the land by a decree rendered in an injunction suit, instituted by the owner of the land for the purpose of preventing a sale under an ordinance of the city.

The common council of the city of San Francisco has no authority, under the charter of the city, to impose a penalty of one per cent. per day for the non-payment of an assessment.

Where an assessment was laid for the purpose of improving a street, thereby benefiting the property of the plaintiff in common with the property of other persons owning lots on the same street, and the improvement was completed without the plaintiff's interposing in the outset to prevent it, and he then filed an injunction bill, to stay the sale of his land by virtue of an ordinance of the city, for the purpose of avoiding the payment of his portion of the assessment: *held*. that the injunction ought to be dissolved, on the ground that he who asks equity must do equity, that the city should be permitted to proceed and sell the plaintiff's land for the purpose of satisfying the assessment, leaving him, after the sale, to the technical rights which he set up, by reason, as he claimed, of some irregularities in the mode of making the assessment.

It *seems*, that if the injunction bill had been filed *before* the work was commenced, the court would have felt bound to inquire into the regularity of the assessment.

APPEAL from the superior court of the city of San Francisco, where judgment was rendered in favor of the defendants. The facts, so far as they are material to an understanding of the grounds upon which the opinion of the court was based, are stated in the opinion.

A. Peachy, for the plaintiff.

Wm. Smith, for the defendants.

By the Court, Bennett, J. An assessment was laid on property in the city of San Francisco, owned or claimed by the plaintiff, for the purpose of improving a street. The common council of the city passed an ordinance directing the improvement to be made; and, *after its completion*, the plaintiff filed his complaint in the superior court, claiming that the assessment was, for numerous causes, unauthorized and illegal. An injunction was accordingly granted to prevent the sale of the plaintiff's land by the defendants. Upon the hearing of the cause, the superior court rendered judgment, that the injunction should be dissolved, and that, in case of non-payment of the assessment within ten days, the land should be sold under the decree of the court.

The judgment of the court is in part correct, and in part erroneous. I do not understand, where an assessment is laid upon property, that it is necessary or proper for a court to interfere, by a decree rendered in an injunction suit, brought by the owner of the land, and order a sale of the premises. The injunction being removed, the city should be left to make the amount of the assessment in the ordinary way. The judgment, therefore, so far as it decrees the sale of the land, should be reversed.

The common council had no authority under the charter, to impose a penalty of one per cent. a day for the non-payment of the assessment. This exorbitant imposition ought not, in any event or in any way, to be collected. That part of the judgment which relates to this matter should be affirmed.

The judgment, in other respects, should be affirmed. An assessment was laid for the purpose of improving a street, and thereby benefitting the property of the plaintiff in common with the property of other persons owning lots on the same street. The work has been completed; and after the plaintiff has derived all the benefit and profit therefrom, and after the con-

tractors with the city have expended their labor and money to improve the plaintiff's lots, he comes into court, when he is called upon to pay his proportion of the expense, and asks, in effect, that he may be exempted from the general burden imposed for the common benefit of himself and others, on the ground that there are some irregularities in the mode of making the assessments. I think, that should not be permitted. The plaintiff asks for the equitable interposition of the court to prevent a sale of his land by the defendants; but, every principle of equity and justice demands that the plaintiff should pay; and it is one of the first maxims of equity jurisprudence, that he who asks equity must do equity. (1 *Story Eq. Juris. sec.* 64; *Francis' Max.* 1.) Thus, if a borrower of money upon usurious interest, seeks to have the aid of a court in cancelling or procuring the instrument to be delivered up, the court will not interfere in his favor unless upon the terms that he will pay the lender, what is really and *bona fide* due to him. So, on the other hand, if the lender seeks to assert and enforce his own claim under the instrument, the borrower may show the invalidity of the instrument, and have a decree in his favor and a dismissal of the bill, without paying the lender any thing; for the court will not assist a man in effectuating an unequitable or illegal purpose. There are many other illustrations of the maxim. As if a second incumbrancer should seek relief against a prior incumbrancer, who would have had a claim, according to the English law, to tack a subsequent security, the relief would not be granted without the payment of both securities. So, where a husband seeks to recover his wife's property, and he has made no settlement upon her, he shall not have it without making a suitable settlement. So, where an heir seeks possession of deeds in the possession of a jointress, he shall not have relief, unless upon the terms of confirming her jointure. So, where a party seeks the benefit of a purchase made for him in the name of a trustee, who has paid the purchase money, but to whom he is indebted for other advances; he will not be relieved, but upon payment of all the money due to the trustee. (*Story as above cited.*) I think the maxim that he who asks

equity should do equity, the application of which, in a few instances, has been noticed, ought to be decisive against the plaintiff's right to an injunction in this case. He asks the interposition of the court to stay the defendants from selling his land for the purpose of paying an assessment, which in justice he ought to pay. The court below, by its judgment, held, in effect, that, as there was no equity on the side of the plaintiff, it would not interfere to prevent a sale, but would leave him to his strict legal rights, if he has any, after the sale of the premises on which the assessment was laid. I think that the decision of the court is correct in this respect, and that the defendants, or the proper officer of the city, should proceed to sell the land for the payment of the *assessment*, and that alone. Had the plaintiff instituted his proceedings before the work was commenced, and enjoined the city from making the improvement, I should have felt it necessary to inquire into the validity of the ordinance, by virtue of which the assessment was made and sale ordered, and into the powers of the common council, under the charter, to make the assessment in the way they did make it. As the case now comes up, I do not deem this inquiry necessary.

So much of the judgment of the superior court as decrees a sale of the premises should be reversed, and so much of it as enjoins the defendants from collecting the one per cent. a day, together with that portion of the decree which dissolves the injunction in other respects, should be affirmed. The matter will thus stand, except as to the collection of the one per cent. a day, the same as if no proceedings had been instituted, and the parties will be left to their strict legal rights after a sale of the premises, by the proper authorities, and in the mode prescribed by law.

Ordered accordingly.

HASTINGS, Ch. J. The record having been destroyed in the late fires, I have prepared no opinion in this case, and cannot now concur or dissent. (*a*)

(*a*) In three other cases decided at this term the doctrine of the above case of *Weber* v. *The City of San Francisco et al.* was affirmed.

INNIS *vs.* THE STEAMER SENATOR.

An appeal may be taken from a judgment of the district court, without moving for a new trial in that court.

A vessel in the harbor of San Francisco, moored in the usual track of bay and river steamers, should set a light and keep a watch in a dark night, or she cannot recover damages for an injury sustained by being run into by a steamer, where there was neither gross negligence nor intentional wrong on the part of the steamer. The want of such watch and light is to be deemed negligence *per se*, and the court should instruct the jury in such case to find a verdict in favor of the defendant. *Per* HASTINGS, Ch. J.

The declarations of an agent, when but the bare narration of an act which had already taken place and was fully ended, do not form a part of the *res gestæ*, and are inadmissible in evidence against his principal. *Per* BENNETT, J.

Where improper evidence is submitted to the jury, under objection, a new trial will be granted on appeal, unless the court can see that such evidence could not possibly have had an effect upon the jury prejudicial to the appellant.

APPEAL from the district court of the district of San Francisco. The facts are stated in the subjoined opinions.

M. H. McAllister, for the plaintiff.

Allen T. Wilson, for the defendant.

By the Court, HASTINGS, Ch. J. I think a new trial should have been moved for by the defendant's counsel, and that without such motion made, and overruled, in no case should this court interrupt the verdict of a jury; but this court, in several cases, myself dissenting, has determined otherwise. It appears that the ship *Rhode Island* was freighted mainly with lumber, and moored near, if not in, the usual track, or in the line of steamers and other vessels entering the harbor, further down the bay than where vessels usually discharge—that she exhibited no lights, and had no watch on her decks—that vessels on either side of her hoisted lights—that in this harbor some vessels, when moored, set a watch and lights, and some do not. Upon the

question whether it is customary or required by prudence to set a watch or hoist lights, there was conflicting testimony. At the time of the collision the atmosphere was hazy, and the vessel was obscured by the shadows of the hills. It is not contended that the accident was wilful or was occasioned by the gross negligence of those in command of the steamer *Senator*. It appears from the testimony of several witnesses on the lookout at the time, that the collision was merely accidental, and could not be avoided after the *Rhode Island* was first visible. The court gave nearly all the instructions asked on either side, there being twenty on the part of the defendant, which were all given but two.

It is contended on the part of the respondent, that the defendant cannot complain of the ruling of the court on these instructions; and on the part of the defendant, it is said the giving of all the instructions asked on either side had a tendency to mislead and confuse the minds of the jury. It is evident that the instructions of the court were favorable to the defendant, and from the testimony of all the witnesses it is clear that the *Rhode Island*, moored where she was, without lights or a watch, was in fault; and, for the reason that the jury found against the instruction of the court, and against the evidence which clearly shows some negligence on the part of the *Rhode Island*, the verdict should have been set aside and a new trial granted. In the case of *Simpson* v. *Hand*, (6 *Wharton's Rep.* 324,) the court say, as contended by counsel, that "a vessel is doubtless not bound "to show a light when she is moored out of harm's way, and that "it was proved, in that case, to be a custom of the river, (Dela- "ware,) in nights of unusual darkness, to set a light. The "*Rhode Island* was not so moored, and no custom is so well "established in this harbor as to be recognized as the law of the "harbor." I think the court should have instructed the jury that want of a light and a watch, in the position of the *Rhode Island*, was such negligence on her part, as to prevent a recovery. In the case above cited, Chief Justice GIBSON says, "Indeed, the hoisting of a light is a precaution so imperiously "demanded by prudence, that I know not how the omission of

" it could be qualified by circumstances, any more than could " the leaving of a crate of china in the track of a railroad car; " or how it could be considered other than as negligence *per se*." In that case, it was clearly proved that defendant's vessel was in fault, and that, being under sail, the mate discovered the *Thorn* in time to avoid her and prevent the collision, but neglected to do so; yet the court, upon the principle that the *Thorn* was in fault for want of a visible light and a watch, decided that the plaintiff could not recover. So we decided in the case of the *Caleb Curtis*, at the last term. It is not to be understood that all vessels moored should set a watch or exhibit lights, but such only as are moored or anchored in "harm's way," that is, in or near the usual track of daily steamers, or the usual entrance to any part of the harbor.

I think, therefore, the judgment should be reversed.

BENNETT, J. This was an action brought by the plaintiff to recover damages resulting from a collision between the steamer *Senator* and the ship *Rhode Island*. At the trial, evidence was given, after exception by the defendant, of statements made by the master of the *Senator*, the morning after the collision took place. These declarations were, that the *Senator* ran into the *Rhode Island* because the captain of the *Senator* was deceived by lights carried by two vessels, one on each side of the *Rhode Island*—that he saw the *Rhode Island*, but supposed she was further off than she actually was—that she was concealed under the shadow of the hill, and he had not time to back the steamboat and prevent the collision.

There can be no doubt about the inadmissibility of this evidence. The declarations of an agent are not competent, except when they form a part of the *res gestæ;* and the declarations objected to, in this case, form no part of the *res gestæ*, but are a mere narration of an event which had taken place and was fully ended. (*Story on Agency, sec.* 135 *to* 138; *Thallhimer* v. *Brinckerhoff*, 4 *Wend.* 394; *Hubbard* v. *Elmer*, 7 *id.* 446; *Mateer* v. *Brown*, *decided in this court*, *ante*, *p.* 221.)

The counsel for the plaintiff, however, says, that although this

evidence may have been inadmissible, it could not have prejudiced the defendant, because the master was himself called afterwards and testified in the cause. If his testimony were, in truth, the same as his declarations proved, it would have resulted that the declarations could have had no influence on the verdict of the jury. But I think the two are not so entirely the same as to warrant us in saying that the declarations could not possibly have operated unfavorably to the defendant. Upon this ground, and this alone, I think a new trial should be granted.

The other questions raised at the trial were properly disposed of, and taking the whole charge of the court together, the case was fairly submitted to the jury.

New trial ordered, costs to abide event. (*a*)

GUNTER *et al. vs.* GEARY *et al.*

If a party desires to bring the rulings of the district judge, during the progress of a trial under review, he must either make out a statement of facts, pursuant to sec. 272 of the Practice Act of 1850, or a bill of exceptions, pursuant to sections 287 and 288. This court will not examine into the correctness of the decisions of a district judge, where it has been left to the clerk of the district court to ascertain and settle what such decisions were.

A lot of land in the harbor of San Francisco, lying within the line of streets as laid down and recognized by the city on its official map, and being in the actual possession of a person who claims to be the owner, cannot be taken from him and appropriated to the public use, without paying him a just compensation. *Per* BENNETT, J.

A common nuisance being deemed an injury to the whole community, every person in the community is supposed to be aggrieved by it, and has the right to abate it, without regard to the question whether it is an immediate obstruction or injury to him. *Per* BENNETT, J.

All that part of a bay or river below low water or low tide, is a public highway, common to all citizens, and if any person appropriates it to himself exclusively, the *presumption* is, that it is a detriment to the public. *Per* HASTINGS, Ch. J.

(*a*) Mr. Justice LYONS was not present at the argument of this case.

The proprietor of a wharf may insist on compensation for the use made of his wharf above the line of low water, but no compensation can be claimed for that part of the wharf below the line of low water. *Per* HASTINGS, Ch. J.

The absolute right of a state to control, regulate, and improve the navigable waters within its jurisdiction, is an attribute of sovereignty, which cannot be disputed, and this right may be delegated to individuals either in a natural or corporate capacity. *Per* HASTINGS, Ch. J.

APPEAL from the superior court of the city of San Francisco. The facts of the case are fully stated in the subjoined opinions.

Jeremiah Clarke, for the plaintiffs.

John W. Dwinelle, for the defendants.

By the Court, BENNETT, J. The plaintiffs, claiming to be the owners of a certain lot, in San Francisco, over which the tide ebbed and flowed, had driven piles over a portion of it, upon which they had built a small house. The defendants, supposing that the lot in question had been appropriated as a public slip, and that the piles and house were an obstruction to the free use thereof by the public, went on the lot and by force turned the plaintiffs out of possession and tore down their house. The action was brought to recover damages for such trespass.

On the 24th day of July, 1850, the city of San Francisco filed a bill in the superior court of the city of San Francisco, to enjoin the plaintiffs in this suit from driving piles and building on the lot in question. An injunction was issued by the court, and the work of the plaintiffs was stopped. The injunction was dissolved by the court on the 31st day of July, and that suit was discontinued. The plaintiffs then proceeded with their improvements. On the 7th day of August, the common council of San Francisco passed an ordinance, appropriating the lot to the purposes of a public slip. The plaintiffs disregarding this ordinance, under the supposition that the common council had no authority to pass it, erected the house on the piles which they had driven, and where the water, at low tide, was from two to two and a half feet deep. The defendant Geary, who was mayor of the city, and the defendant Fallon, who was marshal, assisted

by a number of other persons acting under their directions, after having removed the furniture from the house, pitched the house into the bay. These are, in substance, the facts deducible from the evidence given at the trial. The jury found a verdict against Geary, the mayor, in the sum of two thousand dollars, and acquitted all the other defendants. From the judgment rendered on such verdict the defendant Geary appeals.

The appellant contends that there was error; 1st, in the ruling of the court in admitting certain evidence; and 2d, in the charge of the court to the jury.

The first point we cannot consider. The rulings of the court upon questions of evidence during the progress of the trial, are not brought before us in such a shape that we can review them. Section 271 of the Practice Act of 1850 provides that, "On the "trial of the cause in the court below, any party may require "the clerk to take down the *testimony* in writing; when so "taken down, it shall serve as a statement of facts, unless the "parties afterwards agree to one." Under section 272, a statement of facts proved on the trial, or of the testimony given, may be prepared and settled by the parties in the manner therein prescribed; and under sections 287 and 288, the parties may make out and settle a bill of exceptions to the decisions of the court upon any point of law arising in the cause, and present it to the judge, who, after correcting it, if erroneous, shall sign the same, and direct the clerk to file it among the records of the suit.

In this case, there was no statement of facts, or of the testimony, or of the decisions of the court, prepared pursuant to the requirements of either section 272 or sections 287 and 288. All we have before us, is the testimony taken down by the clerk; but the clerk is not authorised to say what decisions the court did or did not make, and his statement in respect to such decisions, is entirely uncalled for by the statute, and cannot be regarded. If parties wish to bring the rulings of the court during the progress of a trial, under review, they must take some other course than leaving it to the clerk to ascertain and settle what such rulings were. This is in accordance with the statute, and

will establish a more reasonable system of practice, than could be attained by the course adopted by the defendants. We are the more ready to adopt this practice and settle the rule now, because it can work no injustice to the defendants, inasmuch as we are of the opinion that the decisions of the court excepted to, were correct upon all points which could have had any influence upon the verdict of the jury.

The second point arises upon the charge of the court to the jury. It is unnecessary to say, whether the common council had the power to dedicate a portion of the bay lying within the line of streets, as they are laid down and recognized by the city on its official map, as a public slip, provided there were no prior claims to the land, and no interference with possessory rights. The question presented in this case is, whether they had the power to take a lot, in the actual possession of another, who claimed to be the owner, and appropriate it to the use of the public, without paying any compensation, and without any title to the land in the city.

The plaintiffs had, before the passage of the ordinance of August 7th, taken possession of that portion of land, on which they afterwards built their house, by driving piles; the usual, if not the only way by which possession is acquired of land in that portion of the city. They had no title, it is true—neither had the city; but the plaintiffs, having the *actual possession*, could not be deprived of it by the officers of the city. I hold the ordinance of August 7th to be of no effect, so far as the parcel of land on which the plaintiffs' house stood is concerned, and, consequently, that the defendants had no authority for their forcible proceedings in removing it.

The argument of counsel, deducing the power of the common council to lay out public slips, from their authority, under the city charter, to erect, repair, and regulate public wharves and docks, has already been answered by the views above expressed. They cannot take property, in the possession of another, for that purpose, without paying an adequate compensation, where the title is not in the city. The common council, it is true, have power to *regulate* the erection and repair of

private wharves, but that is a different thing from *prohibiting* the erection of them by individuals upon their own lands.

Was the act of the defendant an obstruction to navigation? Upon this point the evidence is somewhat conflicting. The question was fairly submitted by the court to the jury, and if there were no objections to other portions of the charge, I should not feel authorized to disturb the judgment.

The court charged the jury, that the right to remove an obstruction to a highway belongs to those only who actually have occasion to use the highway or who are aggrieved by the obstruction. This presents the question, whether any citizen in the community has the right to abate a common nuisance, or whether that right is limited to those in whose way the nuisance may be, at the very time when they set about removing it.

It is stated, in general terms, in all the authorities, that any one has a right to abate a common nuisance. The very point was decided in *Wetmore* v. *Tracy*, (14 *Wend.* 250;) and, in *Hart* v. *Mayor*, *&c. of Albany*, (9 *Wend.* 571,) though not decided, was fully discussed by Justice Sutherland and Senator Edmonds, who both came to the conclusion that a public nuisance may be abated by any person in the community, (*id.* 589, 608,) without regard to the question whether it is an immediate obstruction or injury to him. And that conclusion seems the most legitimately deducible from the principles upon which the law respecting public and private nuisances proceeds. A nuisance is denominated private, because it injures only a particular individual or class of individuals, and can, therefore, be abated only by him who suffers from it. But a nuisance is common, because it is an injury to the whole community. Every person in the community is aggrieved, and consequently every person has the right to abate the nuisance.

The inference might be drawn from the precedent of a plea cited by the counsel for the plaintiffs, (2 *Chitty Pl.* 571, 572, *Ed.* 1812,) that his position was correct; but the point was ruled the other way in *James* v. *Hayward*, (*Cro. Ch.*) and in *Houghton* v. *Butler and another*, (4 *T. R.* 364.) The first case was an action of trespass for breaking the plaintiff's close, and

pulling up and cutting down a gate. The defendant justified, because the gate was placed across the highway, and so fixed that the *king's subjects* could not pass without interruption by reason of the gate, and therefore he cut it down. The justification was sustained; the court holding it was a common nuisance, for the abating of which no action would lie. The language of the court is, "that admitting it to be a nuisance, although the "usual course is to redress it by indictment, yet every person "may remove the nuisance, and the cutting of the gate was "therefore lawful." There was no averment in that case that the defendant was *specially* aggrieved. *Houghton* v. *Butler and another* seems to support the same doctrine. That was also trespass for breaking down a gate. The defendants justified on the ground of a right of way over the *locus in quo;* and because the gate was wrongfully erected across the way, they broke it down. There was no averment in that case that they were *specially* aggrieved by the gate. So, in the case of *Wetmore* v. *Tracy* above cited, which was an action of trespass for throwing down 100 rods of fence, the defendants pleaded that the fence was a public nuisance obstructing a public highway, and that the defendants removed it as a public nuisance, doing no unnecessary damage. In this case also there was no averment that they were *specially* aggrieved by the fence.

It follows from the above view of the law, that in the case at bar, if the erection of the plaintiffs was a public nuisance, the defendants were justified in removing it. The charge of the court upon this point may therefore have misled the jury. Two questions were submitted to the jury, 1st, Was the building of the plaintiffs a common nuisance? and 2d, Conceding it to be so, had the defendants a right to abate it? The jury might have been of the opinion that it was a nuisance; and yet have been under the impression from the charge, that the defendants, because they had not been *specially* aggrieved, had no right to remove it, and were liable in damages for removing it; whereas the reverse is the law.

It is clear to my mind that it was no nuisance; but that is a matter, not for the court, but for the jury, to decide.

A point was made upon the ground of excessiveness of damages. I do not think them excessive. But a new trial must be granted on the ground of misdirection to the jury.

Ordered accordingly.

By the Court, Hastings, Ch. J. It is admitted that where the plaintiffs drove their piles and erected their house, the water, at low tide, was from two to two and a half feet deep; and still it is insisted that the plaintiffs had acquired rights by such improvements, and had the possession, and that the city authorities of San Francisco, and the public, could not interrupt them in that possession, and appropriate this portion of the bay to public uses without adequate compensation. It is well settled, that all that part of a bay or river below low water at low tide, is a public highway, common to all citizens, and if any person shall appropriate it to himself exclusively, the *presumption* is, that it is a detriment to the public; because it is a diminution of their privilege in the enjoyment of their common right, and the government, by its officer, may enter upon it, and eject him from possession. (*Angell on Tide Waters*, 208–9.) The plaintiffs had no right to the possession, and had no property in that part of the bay, and could have none, as against the rights of the public. As well might the plaintiffs take possession of one of the public streets, fence it in, erect a house thereon, and claim damages for an appropriation of private property to public uses, in case the authorities should remove his "improvements" as an obstruction.

The house of the plaintiffs, being erected in a highway, is to be presumed to be a public nuisance. There can be no doubt that it was a nuisance. It is true, the presumption might be rebutted by showing that so far from having created a detriment to the public, by the structure which he has placed in the highway, he has thereby in truth increased their accommodation, and not diminished it. Had the structure of the plaintiffs been a wharf, or pier, then it possibly might have been shown that their improvements were a benefit to the public; but it is

impossible to conceive how a house, a private dwelling perhaps, in such a locality, can be otherwise viewed than as a detriment to the public. It is held, in the case of *Commonwealth* v. *Wright et al.*, a case which excited much public interest at the time, and reported in the *American Jurist*, and cited in *Angell on Tide Waters*, (206,) that a proprietor of a wharf may insist on compensation for the use made of his wharf within the line of low water, but no compensation can be claimed for that part of the wharf beyond the line of low water. The house of the plaintiffs could not well be appropriated to any public use, and, if it could, they would have no right to insist upon compensation.

The absolute right of a state to control, regulate, and improve the navigable waters within its jurisdiction, as an attribute of sovereignty, cannot be in any manner disputed.

This right often is, both in England and in this country, delegated to individuals either in a natural or corporate capacity. The legislature of this state have conferred this power upon the municipal authorities of the city of San Francisco. It is their duty, then, as the guardians of the interests of commerce and navigation in the harbor of San Francisco, to abate all nuisances, having authority to permit such structures as shall tend to the benefit thereof. In the case at bar, these authorities had appropriated a portion of the harbor for a public slip, and the mayor and his assistants violated no private rights in removing all structures of any kind which they found obstructing the free use of such slip. I can see no possible benefit to result from a new trial, as it would appear to be the duty of the court to set aside a verdict as contrary to law, if found in favor of plaintiffs. The judgment should therefore be reversed; but, as there is a difference in the views entertained by the members of this court, and that this case may now be disposed of and not put over for a full bench, it is ordered that a new trial be awarded. (*a*)

(*a*) Mr. Justice Lyons was not present at the argument of this case.

PIERCE vs. MINTURN *et al.*

An answer is a waiver of a demurrer previously interposed.

Where the parties have not made a case, nor a bill of exceptions, but have relied upon the testimony taken down by the clerk pursuant to sec. 271 of the Practice Act of 1850, no question can be raised, on appeal, respecting the decisions of the court below during the progress of the trial. The case of *Gunter et al.* v. *Geary et al.* (*ante*, *p.* 462,) affirmed in this respect.

Where it is clear that two or more defendants are not *jointly* liable, a *joint* judgment against both cannot be sustained, although each may be *severally* liable; so *held*, in an action by a lessor against two sub-tenants of his lessee, when it appeared that the sub-tenants did not occupy any portion of the premises *jointly*.

A *sub-tenant* can be made liable to the original lessor in an action for use and occupation, or for rent, only for the time during which the *occupancy* of the premises by the *sub-tenant* continued.

A description of premises in a lease, though imperfect, is sufficiently certain, if the boundaries of the premises can be ascertained with a reasonable degree of certainty, and they have been taken possession of and occupied under the lease.

A person who enters into possession of land under another, cannot question the title of him under whom he holds.

APPEAL from the superior court of the city of San Francisco, where judgment was rendered in favor of the plaintiff. The facts are stated in the opinion of the court.

S. Heydenfeldt, for the plaintiff.

Allen T. Wilson, for the defendants.

By the Court, BENNETT, J. Thompson leased certain premises to Fraener—the latter sub-let a portion thereof to Minturn—and, at the time of bringing suit, Nelson was in the actual possession of such portion of the premises as had been sub-let to Minturn, he having been put in possession thereof by Minturn. Thompson sold his interest in the lease to the plaintiff. The rent which Fraener agreed to pay was six thousand dollars a year, at the end of each year, and there was a covenant contained in his lease, that the lessor should have the right *without previous notice or demand to enter* upon the premises and expel

and eject the lessee therefrom, if the rent should remain unpaid for the space of fifteen days after it had become due. The lease bore date the 24th day of August 1849, and the first year's rent became due on the 24th day of August 1850, but was not paid. On the 9th day of September 1850, notice in writing was given that the plaintiff should treat the lease as forfeited for the non-payment of rent, and that he demanded the possession of the premises to be given up to him. The action is brought to recover possession of the premises, and the rents and profits thereof from the time of the forfeiture of Fraener's lease. There is no judgment for the recovery of possession, but a *joint* judgment against the defendants Minturn and Nelson for the monthly value of the premises from the time of the forfeiture.

The defendants demurred to the complaint on the ground of defects therein in substance. The demurrer was overruled, and the defendants answered. It has been decided several times that an answer was a waiver of a demurrer previously interposed. Those decisions dispose of the point urged on the argument, that the demurrer should have been sustained.

There is no statement of facts or of the testimony at the trial made out according to the provisions of section 272 of the Practice Act of 1850, and no bill of exceptions pursuant to the requirements of sections 287, 288, and 289 ; but only a meagre statement of the testimony taken by the clerk at the trial under section 271. It has been held at this term of the court, that no question can be raised respecting the decisions of the court below during the progress of the trial, upon the testimony, objections and exceptions as taken down by the clerk. That decision disposes of most of the points argued by counsel, and leaves us at liberty to pass upon the substantial legal rights of the parties, without being obstructed by technicalities. And looking at the legal merits of the case I think the judgment should be reversed.

The defendants are sued jointly, and a joint judgment is rendered against them, without its appearing, even on the face of

the complaint, that there is any joint liability. On the contrary, it is clear, from the complaint, that there was no joint liability. Neither of the defendants can be made liable to the plaintiff, save by reason of having occupied the premises, and then only for the time during which such occupancy continued. It is not claimed that they occupied the premises jointly, and consequently there can be no joint judgment against them. If they occupied different portions of the lot, they ought not to have been joined, and if joined, judgment ought not to have been rendered against *both*. And there is as little reason to support the judgment against them, in case each occupied the same portion of the lot, but at different times. It does not appear from the complaint or the testimony, whether Nelson was the assignee, under-tenant, or agent of Minturn, and, whether he were the one or the other, I know of no rule of law by which a *joint* action against both can be sustained.

The description of the premises in the lease from Thompson to Fraener, though imperfect, is sufficiently certain, especially as the premises in question were taken possession of, and occupied under the lease.

Fraener having leased of Thompson, and the defendants claiming under Fraener, they cannot dispute the title of Thompson. A person who enters into possession of land under another cannot question the title of the one from whom he claims his right.

But a new trial must be granted on the ground that a *joint* judgment against the defendants cannot be supported.

New trial granted, costs to abide the event.

A motion was made for a re-argument, which was granted—the cause was re-argued—and the opinion of the court on the second hearing was as follows :—

By the Court, BENNETT, J. I think the former decision of the court should stand. The only authority cited by the counsel for the plaintiff on the re-argument, which bears upon the

case, is that of *Doe* v. *Harlow, Kelly, and Warren.* (12 *Adolph. & Ellis*, 40; 40 *E. C. L. Rep.*, 17, *S. C.*) That was an action for *mesne* profits. In that case Warren had held the premises under Kelly by a lease which expired in Midsummer, 1834, during the continuance of which lease Warren underlet to Harlow. Harlow continued to occupy after the expiration of the lease, and during the period for which *mesne* profits were claimed. Warren had said that Harlow paid him rent, and was his tenant; and that he himself held under an agreement with Kelly. Harlow likewise alleged Kelly's title. An action of ejectment had been brought by the original landlords to recover possession, and Kelly defended. For the defendant Warren it was objected that, not having been in the actual possession during the time mentioned in the declaration, he could not be liable in the action. But the chief justice thought there was some evidence as to Warren, and left it to the jury to say how long the three defendants had been jointly keeping out the rightful proprietors; and the jury found against all the defendants. On a motion for a new trial, it was urged on behalf of Warren that he was not in possession when the *mesne* profits were taken. But the court answered that Harlow, who was in the actual possession, was the tenant of Warren. "He encouraged Harlow "to remain," said the chief justice, "and received rent from "him." And in answer to the question put by Lord Mansfield in *Burn* v. *Richardson*, (4 *Taunt.* 720,) and again advanced by the defendants' counsel, "Must not the defendant in an action "for *mesne* profits be the person in actual possession, and tres-"passing?" Lord Denman replied by asking the question, "If "he has put another person in as tenant, and tells him to stay "in, is he not a trespasser by the tenant?" Littledale, J. said it was clear that he was; and Lord Denman, in closing the case, remarked: "*If there had been no evidence here, but that the "under tenant remained in possession, I should have left the "case differently.*"

The case supposed by Lord Denman, in his concluding remark, is more nearly analogous to the case at bar, than to the cause itself in which the remark was made. All the defendants

in *Doe* v. *Harlow et al.*, were held liable, not because Kelly, the first lessee, *had delivered* the possession to Warren, and the latter to Harlow, but because the relation of landlord and tenant continued to subsist between Harlow and Warren, and also between Warren and Kelly; so that Warren, in the language of the Lord Chief Justice, encouraged Harlow to remain, and received rent from him. And here it should be remarked, that no question could arise in that case as to the liability of Kelly. The action of ejectment was conclusive on that point as to him. The only principle which can be extracted from that case, may be stated in the following way :—A. being in the possession of land to which he has no right, leases to B. and receives rent from him, and B. sub-lets to C. and receives rent from him,—all of them acknowledging the mutual relation subsisting between them, and relying upon it for the protection and support of their respective claims; while, at the same time, A. is claiming an interest in the premises, and holding B. liable to him, and B. is receiving rent from C., and encouraging him to remain. It may, perhaps, be said in such a case, that they are liable as joint trespassers. But had A. *delivered the possession* to B., and B. had *delivered the possession* to C., and no other or different connection between A. B. and C. could be made out, then within the very remark of Lord Denman in the case cited, no joint action could be maintained.

That is the case now before us. Fraener, who was himself a lessee, leased to Minturn. It is not alleged in the complaint, nor is it shown by the proof, that Minturn ever took possession of the premises, or received the rents and profits thereof, either in person or by another as sub-tenant or agent, but it is simply charged in the complaint that he *delivered the possession* to Nelson. It is not alleged, nor does it any where appear, that Minturn received any rent from Nelson, or encouraged him to remain in the possession. It is not shown either by the pleadings or proofs whether Nelson was assignee, sub-tenant, or agent of Minturn; neither is it shown, whether he received the rents and profits of the premises for one day or one month. One thing, however, is clear, that he was not in possession at the time suit

was brought, for there is no judgment in favor of the plaintiff for the recovery of possession. Neither does it appear at what time Minturn *delivered the possession* to Nelson, nor whether it was before or after the alleged forfeiture of Fraener's leasehold interest. Had Minturn occupied the premises for a certain period after the forfeiture, and then *delivered the possession* to Nelson, could any one suppose that Nelson was liable for the rents and profits during the whole time which had elapsed after the forfeiture? I cannot. Does any one suppose that the assignor of a leasehold estate, who has parted with his whole interest therein, is liable for the rents and profits of the premises after the assignment, from the single fact that his assignee has continued to occupy them? I do not. And although it is impossible to say what was the relation existing between Minturn and Nelson, for the pleadings and proofs do not disclose it, yet if I were to frame a conjecture, I should say that, in all probability, Nelson was the assignee of Minturn; and if this be so, I do not see how they can be jointly liable.

My views have not been changed by the re-argument, and I think the judgment heretofore rendered should not be disturbed.

Ordered accordingly.

CARRINGTON *vs.* THE PACIFIC MAIL STEAMSHIP COMPANY.

The whole charge of a district judge to the jury should be taken together, and when considered in this way, if it appear that the jury could not have been misled by it, a new trial will not be granted; although some of the instructions may, in slight respects, be repugnant to each other.

APPEAL from the district court of the fourth judicial district. The facts are fully stated in the opinion of the court.

————————, for the plaintiff.

Hall McAllister, for the defendants.

By the Court, Bennett, J. The plaintiff made a contract with the defendants to carry him from New Orleans, on their steamer, which was to leave that city for Chagres on the 15th day of December, 1849. He arrived at New Orleans on that day, and, upon ascertaining that the ticket which he had bargained for, was not a "through ticket" to California, but was only for his conveyance to Chagres, he desired to exchange it for a through ticket on the steamer which was to leave New Orleans on the 15th day of January. The agents of the defendants, Messrs. Paradise, Laurisson & Co., assented to this, but refused to release the plaintiff from his engagement to take passage by the steamer of December 15th, unless he would pay them ten dollars. The plaintiff accordingly paid the ten dollars.

The agents then informed the plaintiff, that on the 17th day of December, they would sell to the first applicants, forty through steerage tickets for the steamer which was to sail from New Orleans on the 15th day of January, and the plaintiff then made a deposit with the agents of two hundred dollars in payment for one such ticket for that steamer. On the morning of the 17th day of December, the plaintiff applied at the office of the defendants for the ticket which he had thus paid for, and was the first applicant, but was informed that the tickets had not arrived from New York, and that he could not be furnished with one at that time. They accordingly gave him a receipt acknowledging the purchase of, and payment for, one such ticket.

On the 9th of January, the plaintiff presented his receipt at the office of the defendants, and demanded his ticket, when he was told by their agents that all the tickets had been given out; and that they could not furnish him with a through ticket on the steamer *Oregon*, which was to connect on the Pacific side with the steamer which was to leave New Orleans on the 15th of January, but that they could furnish him with a ticket by the last named steamer for Chagres, and with a ticket from Pa-

nama by the steamer *Tennessee*, which was the next in the line after the *Oregon*. The plaintiff was obliged to accept of this last proposition. He arrived in Panama in time to take the steamer *Oregon*, and would have taken it, if the defendants had fulfilled their original contract with him, but, in consequence of their violation of their contract, he was detained in Panama from the 1st of February to the 24th of March, on which last day he sailed from there on the *Tennessee*, and, on his arrival at San Francisco, instituted this action to recover damages for the breach of the contract made with the defendants. It appeared on the trial, in addition to the facts above stated, that the plaintiff was taken sick at Panama, and was sick most of the time while he remained there, as well as during his voyage from there to San Francisco; and that the defendants, on the passage from Panama to San Francisco, neglected to provide him with a berth, as they were required by their contract to do. The cause was tried before a jury, who found a verdict of $1000 in favor of the plaintiff.

I think the verdict small enough for the loss of time, inconvenience, expense and sickness, which the plaintiff was subjected to by reason of the breach of contract by the defendants, and I do not feel disposed to disturb the verdict, unless I am compelled to do so on account of improper instructions by the court.

The evidence is sufficient to warrant the jury in finding that Messrs. Paradise, Laurisson & Co., were the agents of the defendants, and had authority to make the contract which they did make to convey the plaintiff to San Francisco. This point may, therefore, be dismissed.

At the request of the plaintiff, the court charged the jury that if they could trace the sickness of the plaintiff to his detention at Panama as a direct cause, they could give damages for such sickness. We are not called upon to say whether this instruction was proper or not, inasmuch as the court, at the request of the defendants, also charged the jury that the sickness of the plaintiff was too remote a consequence to authorize them to consider it in forming their estimate of damages.

This disposes of the instructions of the court asked for by the plaintiff.

As to the instructions asked by the defendants. The court charged the jury as requested by them on all their instructions, being fifteen in number, with the exception of two.

One of these was, that the direct pecuniary loss of the plaintiff was the measure of damages; but the court had already given that instruction, so far as it could be applicable to the facts of this case, by charging the jury, as above stated, in respect to the sickness of the plaintiff, and by further instructing them, that the amount of profits which the plaintiff might have made had he not been detained at Panama, could not be deemed any criterion by which they were permitted to estimate the damages. The whole charge of the court should be taken together, and viewing it in this way, I do not see that it was incorrect, or that the jury could have been misled by any part of it. The judgment should be affirmed.

Ordered accordingly.

STERLING *vs.* HANSON *et al.*

Where, on appeal, the *complaint* is so radically defective as not to authorize the judgment of the court below, a new trial *may* be granted, with leave to the plaintiff to amend his complaint, on such terms as the court below may deem just.

A plaintiff must recover, if at all, according to the averments in his complaint, and a court is not warranted in rendering a judgment in favor of the plaintiff, when there is no averment in the complaint upon which the judgment can be based.

It *seems*, that the joinder of two persons as co-defendants, who have no joint interest in the subject matter of the suit, and are under no joint liability, will, unless the mistake be corrected in the court below, be error.

One part owner of a vessel has no lien on the shares of the other part owners for his advances and disbursements.

APPEAL from the superior court of the city of San Francisco. The facts are stated in the opinion of the court.

————————, for the plaintiff.

————————, for the defendants.

By the Court, BENNETT, J. The amended complaint alleges that the plaintiff was the owner of one-half of the bark *Ardennes*, and that one Hanson was the owner of the other half, and that they agreed to put the ship up for a voyage to Callao, and did send her on such voyage—that the plaintiff accompanied the bark as supercargo, and, during the trip to Callao and back, paid out large sums of money for supplies, seamen's wages, &c.—and that the ship, on her return, was indebted to him in the sum of four thousand four hundred dollars. The complaint further avers, that the voyage was made on partnership account; but there is no allegation that the bark was bought for the partnership business, or was put into partnership account. It is also stated, that after the vessel had sailed from San Francisco, Hanson sold all his interest in the bark and the partnership adventure to Ludlow, and that the latter undertook to pay his equal share of all the expenses of the voyage. The complaint prays for judgment against Hanson for one-half of the expenses of the voyage, and for a like judgment against Ludlow, together with a decree that his share of the bark should be sold; and after trial, the court rendered judgment in all respects according to the prayer of the complaint.

To the original complaint a demurrer was put in by the defendants. Hanson answers the amended complaint, but no answer by Ludlow appears on the record. No point, however, has been made on this ground, and perhaps we ought to presume that an answer was put in by Ludlow, although none appears on the return.

The facts set forth in the complaint are, perhaps, for the most part, sustained by the evidence. At all events, the court below thought so, and we shall not review their decision in this respect. But the facts set forth in the complaint itself, do not warrant the judgment. According to these, the plaintiff and Hanson owned the bark as tenants in common, at the time she

was put up for the voyage to Callao. Each was then entitled to receive from the other one-half of the profits which should be made on such voyage, and each was liable to the other for one-half of the losses; but neither had any lien on the share of the other in the vessel for advances or disbursements. (*Abbott on Shipping*, 111, 112, *and in notes.*) Hanson as *part owner* would be liable for one-half of the expenses up to the time of the sale of his interest—as *partner*, he would be liable for one-half of the expenses of the whole voyage, by virtue of the partnership agreement, whether he had sold his share in the vessel or not. Ludlow as *part owner* would be liable for one-half of the expenses of the vessel from the time he became part owner—and if it be true, as alleged in the amended complaint, that he undertook, when he bought Hanson's share, to pay one-half of the expenses of the *whole* voyage, then the plaintiff would be entitled to recover from him that amount.

The court, in giving its decision, finds that the bark was partnership property; but the difficulty is, that the plaintiff must recover *secundum allegata*, if at all, and there is no averment in the complaint, either direct or argumentative, that such was the fact. The court, therefore, was not authorized to find that the vessel was partnership property.

There being no partnership, and no lien on the bark for a balance of partnership accounts, that portion of the judgment which orders a sale of Ludlow's interest in the vessel is erroneous.

It appears to me that a great deal of the confusion and difficulty about this case is owing to the joinder of two persons as defendants, who have no joint interest in the subject matter, and are under no joint liability to the plaintiff. I shall not express an opinion whether this would be error, as no point was made as to this on the argument; but it leads to the result, that the plaintiff has recovered a judgment equal to all the expenses of the voyage, instead of one-half, to which latter alone can he be entitled under any circumstances. I think the cause should be remanded for a new trial, with leave to the parties to amend their pleadings, if they are so advised, in such manner and on

such terms as the superior court may deem proper. The costs of this appeal will abide the event.

Ordered accordingly.

BROOKS *et al.* vs. MINTURN.

An answer to a complaint after demurrer overrules the demurrer.

The owner of a ship, chartered by, and in the name of, his agent, may, although he is not mentioned in the charter-party, be shown, by extrinsic evidence, to be the principal in the contract, and will be allowed to avail himself of its provisions.

The register of a ship is admissible in evidence *in favor* of the person claiming to be the owner, in connexion with other evidence tending to establish the ownership.

In the absence of any custom to the contrary, Sundays are computed in the calculation of *lay days* at the port of discharge; but where the contract specifies *working lay days*, Sundays and holidays are excluded in the computation.

It *seems*, that where a chartered vessel is seized and detained by a revenue officer of the United States, the charterer cannot be made liable for demurrage during the period of such detention.

APPEAL from the superior court of the city of San Francisco. The facts will be found in the opinion of the court.

————, for plaintiffs.

A. T. Wilson, for defendants.

By the Court, BENNETT, J. The demurrer put in to the complaint was overruled by the court, and the defendant filed his answer. The answer was, as has been heretofore held, a waiver of the demurrer.

Smith & Lewis chartered the ship *Ocean* to the defendant, to carry a cargo of coal from Panama to San Francisco. The charter-party in the commencement of it purports to be an agreement between "Messrs. Smith & Lewis, consignees of the "British brig *Ocean*," and the defendant, and it is signed by

Smith & Lewis as principals, and not as agents. The plaintiffs, being the owners of the ship, bring the action to recover the freight agreed to be paid by the charter-party, and the defendant contends that the owners cannot maintain the action in their own names, inasmuch as the contract was made with Smith & Lewis, and not with the plaintiffs. That Smith & Lewis would be personally liable to the defendant for a breach of the contract, had any occurred, there can be no doubt. The authorities are clear as to that matter. But the question presented here is, whether persons not mentioned in the charter-party can be shown, by extrinsic evidence, to be the principals in the contract, and can be allowed to avail themselves of its provisions. Upon this point there is a great conflict in the decisions, and it would be a vain attempt to endeavor to reconcile them all. The rule, which seems to be supported by the greatest weight of modern authority, is that which is laid down by Baron Parke, in *Higgins* v. *Senior*, (8 *Mees. and Wels.* 843,) that it is competent to show, that one or both of the contracting parties were agents for other persons and acted as such agents in making the contract, so as to give the benefit of the contract, on the one hand, to, and charge with liability, on the other, the unnamed principals. (*See Story on Agency, secs.* 269, 270, *and notes; and the note to Thompson* v. *Davenport*, 2 *Smith's Leading Cases*, 222.) According to the above doctrine the suit was properly brought in the names of the plaintiffs, they thereby adopting and ratifying the act of Smith & Lewis in making the charter-party.

At the trial the ship's register was admitted in evidence, for the purpose of proving the plaintiffs to be the owners of the vessel. This evidence was objected to as inadmissible. I think the objection not well taken. The register of a ship is not conclusive evidence of ownership, perhaps not even *prima facie* evidence, but it is in some cases admissible as one item, in connection with other evidence, to establish the ownership. (*Abbott on Ship. marg. p.* 93, 94, *and note;* 2 *Phillipp's Ev.* 39, 40, 115; 3 *Kent, Comm.* 150; *Bixby* v. *The Franklin Insurance Co.* 8 *Pick.* 86.) It is clear, from these authorities, that the

register of a ship is frequently given in evidence, and without attempting to enumerate the cases in which it may, and in which it may not be introduced, I am of the opinion that it is admissible *in favor* of the persons claiming to be owners, in connection with other evidence tending to establish the ownership. Mr. Greenleaf, in his work on evidence, (1 *vol. sec.* 494,) it is true, says, that in favor of the person claiming as owner, the register is no evidence at all, being nothing more than his own declaration, but Mr. Justice BAYLEY, in *Tinkler* v. *Walpole*, (14 *East*, 226,) one of the cases cited by Mr. Greenleaf, says, that the registering of a vessel by an owner in his own name may be *prima facie* evidence for him that he is owner, because he thereby publicly challenges all persons that he is so; and he distinguishes such a case from one where a person is sued as owner, and the claim is attempted to be supported by such evidence made without his knowledge, and which he has not adopted.

The objection that there was no proof that Smith & Lewis executed the charter-party is untenable. That fact was admitted by the defendant's answer, and required no proof.

By the charter-party the defendant had twenty working lay days, within which to discharge the ship, and ten days thereafter on demurrage at thirty dollars a day. The legal signification of the terms *working lay days* is different from the meaning given to them by the counsel for the defendant. In the absence of any custom to the contrary, Sundays are computed in the calculation of *lay days* at the port of discharge; (*Brown* v. *Johnson*, 10 *Mees. & Wels.* 331;) but where the contract specifies *working lay days*, Sundays and holidays are excluded in the computation. (2 *Bouvier's Dic.* 663.)

On the arrival of the ship at San Francisco, both the ship and coals were seized by the custom-house collector; for what reason does not appear from the record, further than that they were seized for a breach of the revenue and navigation laws of the United States. The coals were from England. Were they seized for non-payment of duties? Was the ship guilty of a violation of the navigation laws? Neither of these questions

can be answered from the record, and consequently it cannot be determined whether the master of the ship, or the defendant, was in fault in causing the detention of the ship, and the non-delivery of the coals. If it were the fault of the master, I do not see how the defendant can be made liable for demurrage. Indeed I do not well see how he could, in any event, be liable. It does not appear that he was not ready, at all times, to receive the coals, or that the vessel was detained a single day by him. Her detention was owing to the fact of the seizure by a United States officer. But it is unnecessary to determine now, whether, under any circumstances, the defendant would be answerable for demurrage, and we pass the question, barely adding that there is nothing in this record to charge him on that ground.

Are the plaintiffs entitled to recover freight? They carried the cargo to the port of destination, and nothing further was required of them except delivery. But the coal was delivered by the plaintiffs and received by the defendant, although after a detention of three months. The fact of the detention cannot deprive the plaintiffs of their right to receive the freight, subject to a deduction for such damages as the defendant may have sustained by reason of the non-delivery when the defendant was first ready to receive the cargo, in case it was the fault of the master that the cargo was not then delivered, and provided such a defense be admissible under the pleadings. If it was the fault of the defendant, then there should be no deduction from the full amount of freight agreed to be paid.

From the view above taken it follows that there must be a new trial for the purpose of inquiring—1st. Whether the seizure by the collector was legal, and if so, whether it was made on the ground of a violation of the laws of the United States by the master of the vessel, or by the defendant. If the seizure were legal, and occasioned by any act or neglect on the part of the master, the plaintiffs would be entitled to recover the freight, subject to the deduction above mentioned, in case the pleadings would admit such deduction, but could recover nothing for demurrage. If the seizure were legal, and occasioned by any act

or neglect on the part of the defendant, such as a neglect to pay duties on the cargo, then, the plaintiffs will be entitled to recover the full amount of freight, (*see Morgan* v. *The Insurance Co. of North America*, 4 *Dallas*, 455,) and perhaps demurrage, upon which latter subject I express no opinion at present. If the seizure were illegal, I think the plaintiffs may, within the principle of the case of *Morgan* v. *The Insurance Co. of North America*, recover the full amount of freight, but no demurrage. In such case the plaintiffs must look to the collector for their damages.

New trial ordered, costs to abide event.

PUGH *vs.* GILLAM.

A British seaman, on board a British vessel, of which a British subject is master, may, when discharged by the master in a port of the United States, without any fault on the part of the seaman, sue for and recover his wages in a state court.

APPEAL from the superior court of the city of San Francisco. The facts are stated in the opinion of the court.

James McGay, for the plaintiff.

John Chetwood, for the defendant.

By the Court, BENNETT, J. The plaintiff was a British seaman on a British ship. The defendant, who was master of the ship, was also a British subject. Upon the arrival of the ship at San Francisco, and seven days before the expiration of the time for which the plaintiff was hired, the defendant discharged him without paying his wages. The court below found the fact specially that the plaintiff was *not a deserter*, but was *discharged* by the defendant. This action is brought to recover the plaintiff's wages.

The only question presented by the case is whether a state court can, or ought to, take jurisdiction of the action. The counsel for the defendant claims that the parties ought to be remitted to the forum of their own country. I think, however, that in a case like the present, the state courts not only may, but ought to take cognizance of the action. The period of the plaintiff's service was nearly ended; he had shipped for eighteen months, and but seven days of the whole term remained unexpired. The ship was about proceeding on a long voyage, which the plaintiff could be under no obligation to perform; and even if he had left the vessel, without permission of the master, I should have thought him entitled to his wages. But he did not leave without permission. He was discharged by the master, as he ought to have been. The master had no right to require the plaintiff to proceed with him on the new voyage, which he was then about to commence; and the discharge does not appear to have been on the ground of any wrongful act of the plaintiff. Under these circumstances there is no excuse for the non-payment of wages. It is said that the comity of nations requires us to dismiss this suit. On the contrary, I think it is our duty to foreign nations to see that their seamen are not discharged, unpaid, in our harbors. We ought not to deny to their seamen the right to prosecute in our courts for wages which the master refuses to pay. However this may be, we surely have the right to protect ourselves against the evils which might, and probably would result, from permitting masters of foreign vessels to discharge their seamen and hands in our harbors, without money, acquaintances, or resources of any kind, and thus leave them to become, perhaps, a burden on the community. There is probably not a court in the whole empire of Great Britain which would deny redress to the plaintiff in this case, and the government of Great Britain cannot complain, on the ground of the comity of nations, that we administer the same justice that would be meted out by any of its own courts. It would not ask that we should turn one of its subjects out of our courts, and send him ten or fifteen thousand miles to sue for and recover the sum of two hundred and fifty dollars.

But irrespective of the reason of the thing, the case is clear upon authority. In *Johnson* v. *Dalton*, (1 *Cow. Rep.* 543,) it was held, that where a British seaman was legally discharged from a British ship in this country, he might maintain an action in our courts against the master, who was also a British subject, for a tort committed on the high seas, while the relation of master and seaman existed. It is laid down in *Curtis' Rights and Duties of Merchant Seamen*, (*p.* 359,) as the result of the authorities establishing the rule in this country, that where the voyage is terminated, either by its completion or abandonment, or there is a dissolution of the contract by the wrongful act of the owner or master, the suits are entertained; but where the voyage has not terminated, or the seamen have bound themselves to abide by the decisions of their own tribunals, they are remitted to their own forum. Mr. Benedict in his *Admiralty Practice*, (*sec.* 282,) concludes an examination of the subject by saying: "In the present state of international intercourse and commerce, "all persons in time of peace have the right to resort to the "tribunals of the nation where they may happen to be, for the "protection of their rights. The jurisdiction of the courts over "them is complete, except when it is excluded by treaty." This is also in substance the conclusion to which Judge Story comes in *The Jerusalem*, (2 *Gallison*, 190,) and is, I think, supported by abundant authority. (*See Willendson* v. *The Forsoket*, 1 *Pet. Admiralty Decisions*, 197; *Moron* v. *Boudin*, 2 *id.* 415; *Weiberg* v. *The St. Oloff*, 2 *id.* 428.)

I think the judgment of the court below should be affirmed.

Ordered accordingly.

PANAUD *vs.* JONES.

Where a last will and testament was executed, on the 19th day of Sept. 1846, by a Mexican citizen of California, before the judge (*Juez*) of the place, who certified at the foot of the will, that the testator was possessed of his entire judgment and understanding, and retained his perfect memory; *Held*, that it was incumbent on the person contesting the validity of the will to establish, that the testator was not of sound mind and disposing memory.

A verdict of a jury will not be disturbed on the ground that evidence was offered and received at the trial, after objection, that a custom had prevailed in California, amongst Spanish and Mexican residents, before the acquisition of the country by the Americans, that no more than two witnesses were requisite to attest the execution of a will, when it appears from such evidence that the custom had prevailed generally and for a long time.

The civil law, except so far as it has been expressly adopted by the legislative power, is without authority either in Spain or Mexico. *Per* BENNETT, J.

By Spanish and Mexican law, wills are divided into solemn or sealed, and open or nuncupative. The former need not be written by, nor be subscribed by, the testator, but must be attested by the *escribano* of the place and seven witnesses, by subscribing their names on an envelope in which the will is enclosed, the testator saying to them, "This is my will; I desire you to write your names upon it;" such a will was, probably, never made in California; in the latter, the testator declares his will, either *viva voce*, or in a writing which he reads himself, or has the *escribano* read, if one is in attendance, or any one of the witnesses present, so that all the witnesses present may hear it. Such a will need not be signed by the testator.

Where an open will (*testamento abierto*) was admitted, on the face of the complaint, to have been "dictated" by the testator, and was reduced to writing, and signed by three subscribing witnesses, citizens (*vecinos*) of the place, one of whom was the Alcalde, and it was recorded in the proper book of the *Juzgado; Held*, that the will was valid, although the testator had not signed it, and although it was not made in the presence of an *escribano*.

By the civil law, an *escribano* may act in the double capacity of *escribano* and witness, in the execution of a will. *Per* BENNETT, J.

Where authorities differ, the court ought to adopt that opinion which is most in unison with the former condition of things in California, and which will best conduce to uphold and carry into execution the intention of the parties. *Per* BENNETT, J.

A will is valid, although one of the three subscribing witnesses was Alcalde of the place.

Where a testator had precisely ordained in what way his property was to be disposed of, and what duties the executors were to perform; *Held*, that the will was valid, notwithstanding one of the three subscribing witnesses was named in the will as one of the two executors, he not being named as heir or legatee, nor empowered to

institute an heir, nor vested with any discretion in respect to the disposition of the estate; and *held*, further, that such executor was competent as a witness to testify in support of the will.

The formalities of opening and publishing a *sealed* will considered. *Per* BENNETT, J.

A will in writing, having been acknowledged by the testator to be his last will and testament before the Alcalde, who possessed, in California, the powers and jurisdiction of an *ordinary* judge, (*juez ordinario*,) having been attested by the Alcalde and two witnesses, and there having been no *escribano* in the place, and the will having been registered by the Alcalde in his book of records; *Held*, that it was a public writing (*escritura publica*) as fully as it could have been made so in California, and required no further probating in order to authorize the executor to act under it; and *held*, also, that the omission to reduce it to the form of a *public writing* would not have affected its validity; and *held*, further, that it was not necessary in order to uphold acts of the executor, done in conformity with the provisions of the will, to show that he had taken out letters testamentary, the will itself being his authority and commission.

Alcaldes in California had all the powers and jurisdiction of judges of First Instance in districts where there were no judges of First Instance. *Mena* v. *Le Roy* (*ante*, *p.* 216,) affirmed.

The records of the place in which the testator lived and where his will was made, having been scattered or destroyed by a public enemy; it must be presumed, under the maxim *omnia præsumuntur rité et solenniter esse acta*, that the will was duly registered in the proper book of records. *Per* BENNETT, J.

An Alcalde appointed in a will as executor, but not named therein as heir or legatee, nor deriving any profit or advantage under it, and being allowed by law no compensation for his services, is competent to authenticate the will in his judicial capacity.

Where a full inventory of all the effects of the deceased is embodied in a will, it *seems* to be unnecessary for the executors to make out a new inventory; at all events, their neglect or omission to do so will not invalidate the will.

Where a testator, in his will, appointed two persons as executors, and gave to *each* of them *all the power over his property which he himself possessed as fully as in law may be required*, and empowered them to *sell it as to them should seem proper*, for the purpose of carrying into effect a provision in his will to pay his debts, and one of the executors, in good faith, and for a fair price, sold a portion of land for the purpose of raising money to pay the debts of the testator; *Held*, that the transfer, when attacked by the heirs of the testator, was valid, although not executed by the co-executor, when it appeared probable, from the testimony, that he advised and assented to the sale; and *held*, further, that a private sale was good, and that it need not have been at auction.

A part of the purchase money having been paid down, it *seems* that the heirs could not rescind the contract of sale, without first refunding the amount so paid. *Per* BENNETT, J.

By Mexican law, the wife, during the continuance of the marriage, has a revocable and *feigned* dominion in, and possession of, one half the property jointly acquired by her and her husband, (*gananciales*;) but the husband is the real and veritable

owner, and has the irrevocable dominion in, all the *gananciales*, and may sell and dispose of them at pleasure.

After the death of the wife, the husband may dispose of the *gananciales*, without being obliged to reserve for the children of the marriage either the property in, or proceeds of, the *gananciales*.

If the heirs of a deceased wife be the children of the marriage, they have the right of succession, on the death of the father, to the whole estate, (*gananciales*,) with the right in the father to dispose of one fifth; but by the *estate* in law is understood the *residue*, after all debts have been paid.

A father, during his life time, and after the death of his wife, may, although there have been children of the marriage, dispose of the *gananciales* for any honest purpose, when there is no intention to defraud the children, and may, by last will and testament, direct the sale of them for the payment of his debts.

A. having married, and there being children of the marriage, and his wife having died, and there being common property acquired during the marriage, (*gananciales*,) *Held*, that the children, upon the death of the wife, did not acquire a *vested* estate in the common property, (*gananciales*,) and that the father had the absolute dominion in, and control over, and power to dispose of, such property during his life, and the power by last will and testament to direct the sale of the same for the payment of debts, not only such as were contracted during the continuance of the marriage, but also such as were contracted by the husband after the dissolution of the marriage by the death of his wife.

J. M. Jones and *A. C. Crittenden*, for the plaintiff.

Horace Hawes, for the defendant.

By the Court, Bennett, J. Clement Panaud was duly appointed by the court of First Instance of the district of San José, as *curator ad litem* for Isabella Alviso and Maria A. Alviso, infants under the age of twenty-one years, for the purpose of prosecuting this suit to recover certain real estate of the *succession* of their father and mother, Anastasio Alviso and Maria Antonia Altamarano. Panaud accordingly filed his complaint, alleging that the said Isabella Alviso and Maria A. Alviso were the legal descendants and heirs of Anastasio Alviso and Maria A. his lawful wife, that said Anastasio died in the *Pueblo de San José* about the 20th day of September, 1846, his wife having died some years before. The complaint sets forth that Anastasio Alviso, on the eve of his death, *dictated* a written instrument purporting to be his last will and testament, wherein he named Pedro Chevallo and Blas Alviso his testa-

mentary executors, and directed them, if necessary, to sell the house and premises, to recover which this suit is brought, in order to pay certain debts. The premises were claimed to be a part of the *community* between Alviso and his wife. The will in question is as follows:—

"In the name of Almighty God, one in essence and three in "person, I, Anastasio Alviso, native of the jurisdiction of San "Francisco, and citizen of the *Pueblo* of San José, legitimate "son, and of legitimate matrimony, of Don Ignacio Alviso y "Doña Margarita Bernal, now deceased, natives of this depart- "ment, finding myself ill in bed of the sickness which God "our Lord has been pleased to visit upon me, but in my entire "judgment and memory, believing, as I firmly do, all the mys- "teries of our holy Catholic faith, in the belief whereof, and "faith in the divine mercy to pardon me all my sins and offen- "ses, through the intercession of the most holy Mary, our "Lady, whose patronage I implore, so that, with my guardian "angel, the saint of my name, and other saints of my devotion, "I may be favored and protected in the transit of my death, I "make, authorize, and ordain, this my testament, in form follow- "ing, to wit: I commend my soul to God, who created it from "nothing, and my body to the earth, from which it was formed.

"I declare that I am the widower of the deceased Maria An- "tonia Altamarano, by whom I had five children, two males "and three females, Blas, Ignacio, Isabel, Antonia and Ge- "ronima.

"I declare this is my will, that my body be interred in the "sacred place of Santa Clara, after having been laid out in the "habit or grave clothes which may be attainable, and that "there be such masses as may be possible, and the Señor "Padre's conscience may dictate. I say, that at the time of "my marriage with said Maria Antonia, she brought no dowry, "and neither she nor I had any capital, and that there was given "to her twelve reals of arras; and that neither of the above "mentioned children has received any donation or portion of "any kind.

"PASSIVE DEBTS.

"Item.—I declare that I owe Señora Pacheco, seven hides.

"Item.—I declare that I owe Señora Candelaria Patim, five "hides.

"Item.—I declare that I owe Antonio Chevallo, thirty-six "dollars.

"Item.—I declare that I owe old Captain John Burton, twen-"ty-two or twenty-three dollars.

"Item.—To the merchant ship of James Magnale I owe one "hundred dollars, and of this amount, forty dollars have been "paid in silver.

"ACTIVE DEBTS.

"Item.—I declare that José Romero of this town owes me "for a lame horse.

"Item.—I declare that I have a yoke of oxen, two mares, "three colts, and one horse which Victor Romero is breaking, "one kitchen untensil lent to Vicente Manez, and the other kitch-"en utensils the Portuguese Manuel has, and they will be what-"ever he, in his conscience, may think proper to deliver over.

"Item.—I declare that I have a house, that in which Señor "Fernandez lives, and which he has hired at eight dollars a "month for the term of one year, which time being ended, "Señor Fernandez will pay up said rent; then let the house be "sold to cover debts; the remainder, including moveables and "property in the country, will be divided among my legitimate "children in equal portions.

"Item.—It is my will, that my said children remain under "the protection and guidance of my Señor Father Ignacio Al-"viso, whom I entreat by all my hereditary right, if he shall "deem me creditor, to make distribution thereof among my "aforesaid children.

"Item.—After all which is before expressed, has been fulfilled "with respect to my debts and credits, I institute as my sole "and universal heirs, the said Blas, Ignacio, Isabel, Maria An-"tonia, and Geronima, children of myself and the aforesaid "Maria Antonia, my wife, and the other legitimate descend-

"ants which I may have at the time of my decease, and who "ought to inherit, so that they take respectively according to "their order, grade, and representation, and the disposition of "the law, with the blessing of God and my own.

"Item.—I name as testamentary executors, (*albaceas*,) of this "my will, Pedro Chevallo, and my son Blas Alviso, and to "each one of them I give all my own power, as fully as in law "may be required, in order that they may take possession of "all my property and sell it, as to them may seem meet, and "out of the proceeds thereof pay the dispositions of my will, "within the legal term, or such future time as they may find "necessary for which object it is hereby prolonged, and I give "them power to delegate their offices, and substitute others in "their stead, so that they, the said substitutes, may carry into "due execution this my will, and they are to be considered as "if herein named, and clothed with the same powers and facul-"ties as those whose names are above expressed. And by "these presents, I revoke and annul whatever testament or "testaments, codicil or codicils, I may have made and author-"ized, so that any such, which may make appearance or be "shown, shall have no effect or validity, although they should "have derogatory clauses and particular words, whereof espe-"cial mention ought to be made; of which however I have no "recollection.

"Thus I authorize it before the present judge of the place, "on the nineteenth of September, in the year one thousand "eight hundred and forty-six, being witnesses the residents Vi-"cente Juanez, and José de Jesus Mesa.

"And I, the judge present, give faith that I know the testa-"tor, who to appearance is of sound mind and perfect memory; "in testimony of which I sign,

(Signed) "PEDRO CHEVALLO.

"Witness. (signed) JOSÉ DE JESUS MESA.

"Witness. (signed) VICENTE JUANEZ."

"Recorded in the book of this Juzgado, at pages 274, 275, "and 276. (signed) FERNANDEZ."

The complaint alleges that Pedro Chevallo, claiming to act under the will, took possession of the house and lot in controversy, and, by an instrument in writing, dated September 16, 1847, pretended to sell the same to the defendant. The complaint insists that the will, and all sales made by virtue thereof by Pedro Chevallo, are null and void, on various grounds:—

First. Because the minor children of Maria and Anastasio Alviso had a vested estate in the undivided one half of the house and premises in dispute by right of inheritance from their mother, and that their father had no power to dispose of the same by any title whatever. 2d. Because Anastasio Alviso, at the time he dictated his will, was not in a situation legally to bequeath his property. 3d. Because the will is not signed by the testator, nor is any reason given therein why he did not sign it. 4th. Because the will is not subscribed by the number of witnesses required by law, and because the residences and qualifications of the subscribing witnesses are not stated. 5th. Because Pedro Chevallo could not legally act as executor. 6th. Because the will was never probated, and because Pedro Chevallo was never recognized or confirmed as executor by any court of justice.

It is further alleged in the complaint that the sale from Pedro Chevallo to the defendant was void for the following reasons in particular: 1st. Because Pedro Chevallo had no right to sell without the consent of his co-executor Blas Alviso. 2d. Because he sold without the formalities required in the sale of the property of minors, and at a price below the real value of the property. 3d. Because the defendant has not complied with the conditions of the sale, nor paid the purchase money.

The complaint prays that the will of Anastasio Alviso and the sale from Pedro Chevallo to the defendant be declared null and void, and that the defendant be adjudged to deliver up the premises, and be condemned to pay four hundred dollars per month for the use and occupation of the house after the commencement of this suit.

The defendant insists in his answer, that the plaintiff, by his own allegation in the complaint, has shown title in the defend-

ant, by averring that the will in question was in fact dictated by Alviso, and was his last will, that he named Pedro Chevallo his executor with power to sell, and that Chevallo did sell the premises in question to the defendant. The defendant then insists on his part: 1st. That the sale by Chevallo was authorized by the only judge in the place, John Burton, Esq., then First Alcalde, who attests the instrument of sale. 2d. That the price paid was much above the value at that time. 3d. That the executor, by the custom and law of the country, as well as by the express requirements of the will, had a right to sell the property to pay the debts of the testator, and that the appropriation of the proceeds among the creditors or heirs, was not a matter for the vendee to look into, or be responsible for. 4th. That Alviso, when he made the will, was every way legally competent. 5th. That it was not necessary that the will should be signed by the testator—that, if he declared it to be his will, it was enough. 6th. That each executor was clothed with the testator's full power to sell. 7th. That the will had been executed in the presence of, and authorized by, the judge of the place, and was, in addition, admitted and recognized by the plaintiff himself. 8th. That every essential formality in the will had been complied with. 9th. That the defendant paid a part of the purchase money on the sale of the premises, and offered to pay the rest as it became due, but that the executor refused to receive it, and that the defendant stands ready now and offers to pay it.

On the filing of the answer the plaintiff put in a supplemental complaint, wherein he insisted that the defendant had no title, for the following reasons in addition to those relied upon in his original complaint: 1st. That if Chevallo ever had any power as testamentary executor, such power ceased at the expiration of one year from the date of his nomination, and that the sale to the defendant was made more than one year after such nomination. 2d. That no sale of an estate is valid unless it be made at public auction. 3d. That no inventory was taken of the estate of either the mother or father of the minors, and that no partition had been made of the property

inherited by the minors from their mother, and the property owned by their father. 4th. That Chevallo should have been confirmed as executor by the judge, on presentation of the will, within one month. 5th. That the sale ought to be rescinded for *lesion*, on the ground that the price agreed to be paid was not equal to one-half the value of the property.

The cause was tried before a jury. The plaintiff established the due appointment of himself as *curator ad litem* for the minor children of Anastasio Alviso. He also proved that they were the children of said Anastasio and his wife Maria Antonia Altamarano, the decease of Anastasio at the time alleged in the complaint, and the death of his wife several years before him.

On the part of the defendant, the will of Alviso was given in evidence, and was proved to have been subscribed by Pedro Chevallo, Vicente Juanez, and José de Jesus Mesa, as attesting witnesses. The will was not signed by the testator. It was proved, that Pedro Chevallo was acting Alcalde of the jurisdiction of San José during the year 1846, at the time of the death of Alviso, and that the property in question had been offered, but a short time before the sale to the defendant, at one-half the price which the defendant agreed to pay for it.

Evidence was given, after objection by the plaintiff, to show that, according to invariable custom, two witnesses were sufficient to attest any instrument, in order to give it validity, and natives and old settlers of the country testified that only two witnesses were required to sign a will to make it valid.

It further appeared from the testimony that Alcaldes were judges of their respective districts.

The transfer from Chevallo to Jones was made in court, and part of the purchase money, amounting to $200, there paid.

It appears that Alviso did not know how to write.

The defendant had offered to pay to Chevallo the balance of the purchase money, but Chevallo refused to receive it, on the ground that the time for payment had passed.

It appeared also that Chevallo had distributed some of the

money which he received from Jones among the heirs and children of Alviso.

Before the commencement of this suit, the validity of the will had been contested between the defendant and Panaud before the judge of First Instance of San José, and the court, after hearing the proofs and allegations in the matter, decreed that the will was good and sustained its validity, and filed it among the records of the office. At what time this proceeding took place does not appear.

At the trial the defendant paid into court the balance of the purchase money due.

The counsel for the plaintiff asked the court to instruct the jury upon seventeen propositions. The court declined to give any specific instructions, but told the jury that they had heard the law and evidence, and were fully competent to decide the matter. The instructions asked involve the principles of law which will hereafter be considered.

Certain testimony was offered by the defendant and received by the court, after objection by the plaintiff, which, though it might not have been strictly competent evidence, could have had no material effect on the result of the suit. It will not be necessary, therefore, to consider it here, inasmuch as I think it clearly established that the minors were, in law, the legitimate children of Anastasio Alviso and Maria Antonia Altamarano.

The whole case appears to me to depend upon the conclusions arrived at on two points of inquiry: 1st. Was the will of Alviso valid in all respects; and 2d. Conceding the will of Alviso to be valid, could Chevallo, one of the executors, convey any title, without the joint co-operation of his co-executor Blas Alviso?

If either of these questions be determined in the negative, the plaintiff is entitled to recover; and both must be decided in the affirmative in order to support the verdict.

The first question, then, to be considered is, whether the will of Alviso was executed with the solemnities and formalities

required by law, and whether, at the time of making it, he was of sound mind and disposing memory.

An answer is very readily given to the last branch of this inquiry. At the conclusion of the will, the *judge*, who attests it, certifies that, to all appearance, the testator was possessed of his entire judgment and understanding, and retained his perfect memory. There is nothing shown to the contrary. But, without any such certificate, it could not be assumed that the testator was mentally incompetent to make a valid will. On the contrary, the reverse must be presumed. If the plaintiff intended to attack the will on that ground, he should have proved that the testator was *not* of sound mind and disposing memory. On reading the whole testimony in the cause, I cannot discover any proof which has a tendency to establish that point. So far then as this objection is concerned, I shall assume that the testator was competent to dictate the instrument in question.

The next question is, whether evidence was admissible to prove that it was the custom to require only two attesting witnesses to a will. It was a maxim of the Roman law, *communis error facit jus;* and this maxim has been adopted in the Spanish law to its full extent. I do not understand that a custom, in order to be asserted, must have prevailed for twenty years and be conformable to law. On the contrary, ten years are sufficient to establish it; and, having prevailed for that length of time, and possessing the other necessary qualities, it acquires the force to abrogate the previously existing law.

" Custom," says Escriche, " is the practice long used and re-
" ceived, which has acquired the force of law. In order that
" custom may be *legitimate* and not corrupt, (*corruptela,*) it is
" necessary that it should have been introduced with the *tacit*
" consent of the legislator—that it be conformable to the ge-
" neral welfare, and that it should have been observed for the
" space of ten years. *Legitimate* custom acquires the force of
" law, *not only when there is no law to the contrary*, but, also,
" when its effect is to abrogate any former law which may be
" opposed to it, as well as to explain that which is doubtful.
" Hence it is said that there may be a custom without law,

"in opposition to law, and according to law." (*Escriche's Derecho Español*, 23, 24. *See also to the same effect*, 1 *Feb. Mej.* 55, 56, *sec.* 2; 1 *Sala Mej.* 248 *to* 253; *Ley* 6, *Tit.* 2, *Part* 1; 1 *Pan. Mej. page* 614, 615, *No.* 1418.) And it is one of the maxims of the Spanish, equally with the Roman law, that custom is the best interpreter of the law. (4 *Sala Mej.* 624, *Regla*, 28; 3 *Pan. Mej.* 629; *Regla*, 29.)

This rule is in accordance with several decisions in the United States. (*Davey* v. *Turner*, 1 *Dallas*, 13; *Lloyd* v. *Taylor*, *id.* 17.) In both these cases it was ruled, that an acknowledgment of a deed by a *feme covert* before a justice of the peace, was sufficient, under a long usage, to make her deed valid, though not strictly in conformity with law. In *Lloyd* v. *Taylor*, it appearing in evidence that it had been the constant usage of the province for *femes covert* to convey their estates in this manner without an acknowledgment or separate examination, and that there was a great number of valuable estates held under such titles, which it would be dangerous to impeach, the court gave a charge to the jury in favor of the defendants, founded on the maxim, *communis error facit jus*, and the jury, accordingly, found for the defendants. The same point was ruled in *McFerran* v. *Powers*, (1 *Serg. & R.* 102.) In this case the acknowledgment was before a justice of the supreme court; and it appeared that it had been the constant practice for the judges of the supreme court to take acknowledgments under an act, by virtue of which, it was claimed, they had no authority. But the court say, "Be that as it may, so extensive and deep-rooted "is the practice, that numerous titles depend on it, and it would "be unpardonable to disturb it now by a critical examination of "the words of the act." (*Per Tilghman, Ch. J.*, *p.* 106.) The same principle was adjudged in *M'Keen* v. *Delancey's Lessee by the supreme court of the United States.* (5 *Cranch*, 22.) The question in this case arose upon the construction of the same act which the court was called upon to interpret in *McFerran* v. *Powers;* and Ch. J. Marshall, delivering the unanimous opinion of the court, says, "were this act of 1715 now, for the first "time, to be construed, the opinion of this court would cer-

witnesses sign with the testator upon the envelope, and that the *escribano* put his hand and seal. In *Febrero Mejicano*, (*vol.* 2, *p.* 7, *sec.* 10,) it is said, "A sealed or written testament is that "in which a testator presents a paper sealed up (*cerrado*) with "wax, wafer, or any similar substance, declaring that therein is "contained his last will. It is indispensable that this declara-"tion should be made before an *escribano*, and seven witnesses "of the required qualifications, under penalty of the will's be-"ing declared a nullity. It is of no consequence whether such "a testament be written by the testator, or by another in his "name, or whether it be on sealed or unsealed paper. That "which is indispensable is, that the testator deliver it to the *es-*"*cribano*, in order that he write his attestation upon the enve-"lope, and that the testator, in the presence of the *escribano*, "sign it with all the witnesses, saying to them, This is my tes-"tament; I request that you write your names upon it."

The indispensable necessity of this formality in the authentication of a sealed testament, which has been made in private, and the knowledge of which is confined to the breast of the testator, is readily perceived. The contents of the testament have never been seen, and are unknown to all the world. The instrument enclosed in the envelope, is not attested by any witnesses, and perhaps not even signed by the testator. It is not to be opened and published until after his death, and then only in presence of the ordinary judge, the *escribano*, the witnesses, and the parties interested. It is presumed that this mode of solemnizing a last will and testament is resorted to only where the testator is desirous of concealing his intentions respecting the disposition of his estate, and is unwilling to trust the secret to any one. Such a will is, probably, but rarely made, and it is doubted whether an instance of a sealed will can be shown to have occurred in California, since the period of its first settlement.

But if the testament be not sealed, whether it be written or dictated *viva voce*, if it be open so that its contents may be known in the testator's lifetime,—in short, if it be no secret,—it is obvious that there would not be the same danger of forgery

and imposition, and that the law would not wisely require the same formalities and strictness of proof in respect to it, as in the case of a sealed testament.

Hence we find that the law has recognized another species of testament, called open, nuncupative, or not sealed. "It is "that," says Febrero, "in which the testator publishes his will, "either *viva voce*, or by means of a writing which he reads "himself, or has the *escribano* read, if one is assisting, or any one "of the witnesses, so that those present may hear it." (2 *Feb. Mej.* 5, *sec.* 4.)

It is true that a certain number of witnesses should be present, when a testament in this form is made, in order that it may be duly substantiated after the testator's decease: but the testament need not be signed either by the testator or witnesses, for it is not indispensable that it should be written, although in practice it usually is. (*Aiora de Partitionibus, Pars.* 3 *Quæs.* 23, *sec.* 70, *ad fin.*) *Law* 1, *tit.* 19, of the *Ordamiento de Alcalá* does not require it to be written. (2 *Pan. Mej. page* 604, *No.* 3290.) Nor does *Law* 3, of Toro, in which the former is adopted and incorporated, and I am not aware of any commentator who holds it to be necessary.

Now, it is admitted of record on the face of the complaint that the will in question was "dictated" by Alviso, that it was in truth his last will, that he therein named Pedro Chevallo his executor, and gave to him the power to sell the premises in question. All this the plaintiff admits, and produces the written evidence, the will itself, upon which appear the names of three subscribing witnesses, who are described in the body of it as citizens of the place, and one of whom is proved to have been the Alcalde. It appears, moreover, by an indorsement upon the same document that a record had been made of it in the proper book of the Juzgado. The plaintiff then, after this, alleges that the will is void because it is not signed by the testator and a certain number of witnesses. But we have above seen that it need not even be in writing or signed by anybody. The law only requires that a certain number of witnesses should be present, in order that proof may exist of the last dispositions

the will is not made in this form, and they are called as witnesses to prove it, they may likewise be received as such, providing there be no matter in dispute respecting the inheritance. But, if they be named to make distribution of the property of the deceased, and stand in the place of heirs, they cannot be witnesses to the testament in which they are named, by reason of the rule that the heir is incompetent to be a witness. (2 *Feb. Mej. page* 6, *sec.* 8.)

This doctrine laid down by Febrero coincides with numerous decisions based upon the principles of the common law both in England and the United States. In *Goodtitle* v. *Welford*, (*Douglass' Rep.* 139,) it was held, that an executor, who takes no beneficial interest under a will, is a competent witness to prove the sanity of the testator. So in *Lowe* v. *Joliffe*, (1 *W. Blackstone*, 365,) an executor in trust, who had taken a legacy of two hundred pounds under the will, but who had released his interest in the legacy, was held to be a competent witness to establish the validity of the will. There have been numerous decisions in the United States to the same effect. Thus in *Hawley* v. *Brown*, (1 *Root*, 494,) the wife was held to be a competent witness to a will, she having no interest but a trust in the estate. In *McLean* v. *Barnard*, (*id.* 462,) and in *ex parte Ford*, (2 *id.* 232,) it was ruled that the judge of probate was a good witness to a will. In *Dunn ex dem. Snedeker* v. *Allen*, (*Penning.* 43,) an executor was held to be a competent witness to a will, unless he take an interest under it. From the above authorities I have come to the conclusion that Pedro Chevallo, who was named an executor in the will, but who took no interest under it, was competent to sign as a subscribing witness, and competent to testify in support of the validity of the will.

Another objection urged against the validity of the will is, that it was never probated, and that Pedro Chevallo was never recognized or confirmed as executor by a court of justice. But can an omission or neglect of duty on the part of an executor named in a will duly made, whether sealed or open, be sufficient cause, either for the revocation of the will, or for declaring it

inoperative? It is apprehended that no authority can be adduced, showing that the intentions of the testator may be thus thwarted after his death, by negligence not his own. Whatever might be the neglect of duty on the part of an executor, or of any other person, with respect to a will in his hands, the law would naturally provide for carrying its provisions into effect when it came to light—imposing upon the delinquent penalties for his neglect of duty, rather than inflicting punishment upon innocent parties by annulling the last will and testament of the deceased. With respect to a sealed will it is easy to perceive that the proving or probating of it, must indispensably precede any act under it; because until it is proved, it cannot be opened, nor can it be known who is executor or who is heir, nor what dispositions are made therein; and when once the seal is broken, and the will opened, the evidence of its authenticity is gone forever. The law, therefore, has prescribed, very minutely, the formalities to be observed in the opening and publication of sealed wills; not for the purpose of giving them any additional *validity*, but in order that the document, which the world has not yet seen, may be ascertained, in truth, to contain the last dispositions of the deceased. For the purpose of protecting legitimate heirs against a spurious offspring, and of enforcing the dispositions of the testator, there is required the presence of the ordinary judge, the *escribano*, and the witnesses, who heard the declarations of the testator when alive, to witness the breaking of the seals and the publication of the will.

Accordingly, he who has such a testament in his power, is required to present it to the judge of the place within one month from the time of the testator's death; and, in default of doing so, he forfeits, for the benefit of the soul of the deceased, whatever bequest may have been made in his favor, or, if nothing be left him in the will, he may be required to pay all damages and a fine in addition. (2 *Sala Mej*. 126, *sec*. 34; 2 *Feb*. *Mej*. 232, *sec*. 1.)

When the sealed package has been presented to the judge, he causes the witnesses and *escribano* who have subscribed their names upon the cover to be cited, and upon their recognizing

their signatures, proving the testator's identity and his decease, the sealed package, upon inspection, being found unbroken, and in no wise defaced or otherwise suspicious in its appearance, the judge causes it to be opened, read and published, in the presence of the *escribano* and witnesses, and to be registered in the proper book, and a record to be made of all the solemnities observed in its publication. Of this record copies are given to such of the interested parties as may demand them. (2 *Sala Mej.* 126, *sec.* 35; 2 *Feb. Mej.* 232 *to* 235, *secs.* 2, 3, 4, 5, 6, 7; 1 *Perez' Compendio*, 227, 228.)

It would seem that the observance of these formalities with respect to an open or nuncupative will, would be useless ceremony. The will has been made openly and published by the testator during his lifetime, and there need be no further publication after his death. If it were made before an *escribano*, or, in defect of one, before a judge whose acts impart absolute verity, it is already probated; and, in the Californias, Alcaldes had all the powers and jurisdiction of judges of First Instance. (*Decree of March* 2, 1843, 2 *vol. of Decrees of Provisional Government; Mena* v. *Le Roy*, *ante*, *p.* 216.) The will of Alviso was made before an Alcalde. But even though it were not made before any officer, yet being reduced to writing, and attested by the requisite number of witnesses, it might have been proved at any time, and the omission to reduce it to the form of a public writing (*escritura publica*) would not affect its validity; for, this may be done and the will be registered for the security of all persons, upon the petition of any party interested. (2 *Sala Mej.* 127, *sec.* 37.)

After a careful examination of the books upon Mexican law, I can find no authority which requires an executor, either in the case of a sealed will or an open will, to take out letters testamentary before he is empowered to act. I find no such doctrine in Febrero, or Sala, or Perez. The authority of the executor is derived from the testator alone, and the will is his commission. He ought regularly to present himself before the judge of the place and be sworn to execute his trust with fidelity, but he is not even required to give any security for the proper discharge

of his duties, so long as he remains free from suspicion. (2 *Feb. Mej.* 158.)

The will of Alviso having thus been acknowledged by him to be his last will and testament, before the Alcalde, who was the ordinary judge, and attested by two witnesses in addition to the Alcalde, who, we have seen, was also a competent witness, and there being no *escribano* in the place, and the will appearing from an indorsement thereon to have been registered in the book of records of the Alcalde, it was, we think, a public writing, (*escritura publica*,) as fully as any document could possess that quality that has ever been executed in the country, and consequently required no further proof.

I have said that the will appeared by an indorsement thereon, to have been registered. Even had not this been done, I should not consider it our duty to declare the will void on account of this omission. And, further, without any proof of registry, I should, under the peculiar circumstances, feel bound to apply the maxim, *omnia præsumuntur rité et solenniter esse acta*, a maxim equally applicable in the civil and common law. It is matter of history, that the records of the Alcalde's office at San José have been mostly scattered or destroyed, and that, at the time of Alviso's death, a public enemy of his country was in possession of the pueblo, and his banner floating over the very house in which the archives were deposited. I think, in such case, it would not be carrying the doctrine of presumption too far, to assume, without proof, that the will of Alviso was duly registered. (1 *Greenleaf, Ev. sec.* 20; *Cowen & Hill's Notes*, 297.)

A question was made on the argument whether Chevallo, the person named as executor, was competent to authenticate the will in his judicial capacity. It has already been seen that, if he were a private citizen, he would be a competent witness. It is equally undoubted in the opinions of Mexican jurists, that a testamentary executor, who derives no benefit under the will, is competent to authenticate it as judge, or in any other capacity. The reason is, that the charge accepted by him is gratuitous, and unaccompanied by any advantage to himself, for the law

allows him no compensation. The judges of the supreme court of Mexico, and the judges of the superior tribunals, are prohibited from taking upon themselves the charge of testamentary executors, but the inferior judges are not. (2 *Feb. Mej.* 156, *sec.* 2.) Febrero, in treating of the persons who may be executors, says, in the section last cited from his work:—"Likewise "the *escribano* who authenticates the testament may be executor, because, besides that he is not prohibited, he thereby "derives only labor and responsibility in fulfilling the will of "the testator, and the obligation to give a strict account of his "trust," &c. But if he derives any benefit under the will, he cannot be executor. It appears, therefore, that the person named in the will as executor, is competent to attest or authenticate it in any form, unless he is also named as heir or legatee, or is in some way to derive profit or advantage under it, which would not belong to him in case of intestacy. The law regards the office of such an executor simply as a friendly and gratuitous office.

Whether it was the duty of Alviso's executors to make a new inventory of his effects, when a perfect inventory appears to be embodied in his will, it is unnecessary to inquire. (*See Aiora de Partitionibus, Pars* 1, *Cap.* 2, *No.* 17.) The material question is, not whether the executors faithfully and punctually performed all the duties required of them, but whether their neglect or omission of duty invalidates the will. I think not.

I have thus examined the various objections made by the plaintiff's counsel upon which he claimed that the will of Alviso was inoperative and void, and have come to the conclusion, that it was made in due form, before the proper authority, was attested by a sufficient number of competent witnesses, and remains unaffected by any omission or neglect of the executors, occurring subsequent to the death of the testator.

The remaining point for examination is, whether Chevallo, the executor, had power to sell and did sell, in legal manner, the premises in dispute to the defendant. And this presents two questions for consideration: First, Whether Chevallo, who was one of two executors named in the will, had power to sell without joining with his co-executor; and Second, Whether,

admitting his sole authority, Alviso could direct by his will, that the premises in question should be sold for the payment of his debts.

The first question is whether Chevallo alone, had the power to make a valid transfer of the property. It may be conceded that, in ordinary cases where two executors are named in a will, both must join in the execution of the powers conferred therein. But, it must also be conceded, that the testator may make dispositions in his will to vary this legal rule. The intention of the testator to be gathered from the instrument itself, is the guide. When that is ascertained, it becomes the law of the case. This is the rule of the common law. It is more especially the rule of the civil law, and of the Spanish and Mexican law. "*Voluntas testatoris pro lege habetur*," says the Pandects. (*L.* 35, *sec.* 3, *de Hæredib. instituend.*) "*La voluntad del testador tiene fuerza de ley*," says one of the maxims of Spanish and Mexican jurisprudence. (3 *Pan. Mej.* 346, *Reg.* 384.) The executor is understood to accept the charge, not for gain, but as the last friendly office which he can perform for the deceased, and he looks to the dispositions contained in the will as the rule by which his conduct will be judged.

In the case before us, the testator gives to *each* one of his executors *all the power over his property which he himself possessed as fully as in law may be required*, in order that they take possession thereof, and *sell it as to them may seem meet*, so that with the proceeds they may fullfil the dispositions of his will within the legal term, or within such longer term as they may find necessary, and for that purpose he prolongs the term prescribed by law. The testator thus conferred all the power which he himself had over his property, not to his executors jointly, but to each one of them, and consequently each one was authorized to dispose of the property for the purposes mentioned in the will. "When several executors "are named," says Sala, (2 *Sala Mej.* 224, *sec.* 4,) "they will "administer upon the estate at the time and in the manner pre-"scribed by the testator, whether jointly, or in succession, or "so that the person first named shall have the administration,

"which is understood to be commanded, when the testator "shall name each one of them *in solidum*." That is, when the testator confers upon each one of several executors, as in this case, full power to administer, he who first enters upon the administration, shall proceed in it to its conclusion, without being obliged to advise with the others, and without their having a right to intermeddle in any respect. (2 *Feb. Mej.* 160, *sec.* 8.) In this case, Chevallo first commenced the administration: by the law above cited, the other had no right to interfere in it. It does not appear that he ever did; on the contrary, it is rendered at least probable by the testimony, that he advised and assented to the sale by Chevallo to the defendant. I think Chevallo alone had power to sell, without joining with his co-executor.

The view above presented affords also an answer to the objection, that the sale was a private sale, and not at auction. The testator gave to Chevallo as full power to sell as he himself possessed, and the general rule of the Spanish law that sales by executors must be at auction, does not apply. In point of fact, as appears from the record, the premises were sold at a price which was proved to have been above their value at that time. The deed of sale was authorized by the judge of the place, who signs it as such, and records it in the book of records of the *juzgado*. One-third of the purchase money was paid at the time; the balance was tendered and refused before the first instalment became due, and was brought into court, and was placed, and still remains, on deposit for the use of the estate. The least the plaintiff could have done, if he wished to rescind the sale, would have been to offer to repay the money which the heirs whom he represents had received from the defendant.

I proceed now to the last point which I propose to examine; and that is, whether Alviso had the power to direct the disposition of the property in the manner specified in the will.

Alviso died a widower in 1846, his wife having died some years before; and it is alleged that, on her decease, one undivided half of the common property became vested in her children by in-

heritance, and that Alviso had no right to dispose of it in any manner. The law respecting the property of husband and wife in California has undergone but little alteration in consequence of the passage of the act of 17th April, 1850, defining the rights of husband and wife. Section 1, of that act declares that "all property, both real and personal, of the wife owned "by her before marriage, and that acquired afterwards by gift, "bequest, devise, or descent, shall be her separate property; "and all property, both real and personal, owned by the hus-"band before marriage, and that acquired by him afterwards, "by gift, bequest, devise, or descent, shall be his separate pro-"perty." It is further provided in the same act as follows: "Section 2. All property acquired after the marriage by either "husband or wife, except such as may be acquired by gift, be-"quest, devise, or descent, shall be common property. Sec-"tion 6. The husband shall have the management and control "of the separate property of the wife, during the continuance "of the marriage," &c. "Section 9. The husband shall have "the entire management and control of the common property, "with the like absolute power of disposition as of his own se-"parate estate. The rents and profits of the separate property "of either husband or wife shall be deemed common property. "Section 10. No estate shall be allowed to the husband as "tenant by courtesy upon the decease of his wife, nor any es-"tate or dower be allowed to the wife upon the decease of her "husband." So far we understand the statute of California to be a correct exposition of the Spanish law respecting the property of husband and wife. But in section 11, we apprehend there is a wide departure from it. That section is as follows: "Upon the dissolution of the community by the death of either "husband or wife, one-half of the common property shall go "to the survivor, and the other half to the descendants of the "deceased husband or wife, subject to the payment of the "debts of the deceased. If there be no descendants of the "deceased husband or wife, the whole shall go to the survivor, "subject to such payment." Now this is manifestly a deviation from the principles of the civil and the Spanish law, unless the

words "debts of the deceased," in this section, shall be construed as including all debts of the community contracted for the common benefit, whether by the deceased or by the survivor. If this construction may be put upon it, then it is consistent with the civil and Spanish law, and what is more, is consistent with reason and justice. I have referred to this statute somewhat at length, not because it controls this case, but for the reason that, with the exception above stated, it contains a clear and succinct statement of the Spanish law respecting the property of husband and wife.

According to *Ley* 1, *tit.* 3, *lib.* 3, *of Fuero Real*, which is *Ley* 1, *tit.* 4, *lib.* 10 *of the Novissima Recopilacion*, the property acquired by husband and wife, or by either of them, during the marriage, whether by purchase or contract, or through their labor and industry, as well as the fruits, profits, and increase arising from their separate estates, which belonged to each before marriage, is held by them in common and denominated *Gananciales*. But (*id. Ley* 2) that which comes to either by inheritance, or gift, or by royal grant to the husband for military service, is the separate property of the party thus acquiring it. And in the conjugal society, which differs in some important particulars from the conventional, it makes no difference, with respect to the right of equality in the participation of gains, how much, either of capital or labor, each party may have contributed towards their production. (1 *Feb. Mej.* 219, *sec.* 4.)

By *Ley* 1, *tit.* 12, *part* 4, which is the same as *Ley* 5, *tit.* 4, *lib.* 10 *of the Novissima Recopilacion*, *& No.* 2774 *of the Pandectas Mejicanas*, *vol.* 2, *page* 447, it is provided that the husband, during the continuance of the marriage, may freely alienate and dispose of the common property, with the exception of that which belongs to the class of *castrenses* or *quasi castrenses*, without the consent of the wife, and such alienation shall be valid, unless it be proved that it was made with intention to defraud her.

Ley 14 *of Toro*, the same as *Ley* 6, *tit.* 4, *lib.* 10 *of the Novissima Recopilacion, and No.* 2775 *of the Pandectas Mejicanas*, *vol.* 2, *page* 448, declares that, the marriage being

dissolved by the death of either husband or wife, the survivor may freely dispose of the *Gananciales*, although he or she may enter into a second or third marriage, and children of the first be living, without being obliged to reserve for such children, either the property or proceeds of such *Gananciales*.

"The wife," says Febrero, (1 *Feb. Mej.* 225, *sec.* 19,) "is "clothed with the revocable and *feigned* dominion and posses- "sion of one half of the property acquired by her and her hus- "band during the marriage; but, after his death, it is trans- "ferred to her effectively and irrevocably, so that, by his de- "cease, she is constituted the absolute owner in property and "possession of the half which he left." But he observes, in the next section, "The husband needs not the dissolution of the "marriage to constitute him the real and veritable owner of all "the *Gananciales*, since, even during the marriage, he has in "effect the irrevocable dominion, and he may administer, ex- "change, and, although they be neither *castrenses* nor *quasi* "*castrenses*, acquired by him, may sell and alienate them at his "pleasure, provided there exist no intention to defraud the "wife. For this reason, the husband living, and the marriage "continuing, the wife cannot say that she has any *Gananciales*, "nor interfere with the husband's free disposition thereof, under "pretext that the law concedes the half to her, for this conces- "sion is intended for the cases expressed and none other."

The doctrine contended for by the plaintiff is, in effect, not only that the community of goods between husband and wife continues after the death of the latter, but that new associates, the children of the marriage, are introduced into the society, and inherit an absolute and indefeasible estate from the mother, who had only the *feigned* and revocable dominion. The children of the marriage are no more the forced heirs (*herederos forzados*) of the wife than of the husband, and they have the right of succession to, not merely one half, but four fifths of the common property, so that, without legal cause, they cannot be disinherited. (2 *Feb. Mej.* 30, *sec.* 13; *id.* 35, *sec.* 13.) And yet, fraud being out of the question, there can be no doubt that the father may freely alienate this property during his life time,

and by his last will direct the sale, distribution and alienation of it for the payment of debts. (2 *Feb. Mej.* 163, *sec.* 12; 2 *Sala Mej.* 225, *sec.* 7.) It is true, that the heirs of a deceased wife have the right of succession to her property, and if it should happen that they are not also the heirs of the surviving husband, an account would have to be taken and a division made; but if the heirs of the deceased wife be the children of the marriage, they have the right of succession, not to the half but to the whole *estate*, with the right in the father to dispose of one fifth. But by the *estate* in law is understood the *residue*, after all debts have been paid, whether contracted during the continuance of the marriage or after the death of the wife. (2 *Sala Mej.* 259, *sec.* 24.)

A father may dispose of his property, not only for the payment of debts, but for any other honest purpose, and it is only when an intention to defraud his children of their legitimate inheritance is proved, that this natural prerogative of the parent can be restrained by an application to the judge. (*Vid. Aiora de Partitionibus, Pars* 3, *q.* 22.)

But what renders the position of the plaintiff more singular is, that the will of Alviso disposes of the estate precisely as the law would have done, if he had died intestate; and the executor has merely executed what the law itself would have ordained. Not even the fifth is given to strangers, but the children are instituted heirs to the whole. The important and essential part of a testament is the institution of an heir. (2 *Feb. Mej.* 26, *sec.* 1.) With a particular restriction in regard to this imposed by positive law, a person may dispose of his property as he pleases. He may direct the sale of his goods, or the distribution of them *in specie*. He may leave the execution of his testament to the instituted heir, where the law places it, or commit the trust to a stranger, and in case of both being unwilling to act, the judge will make the appointment. But in every case the executor, whether testamentary, legitimate, or dative, has only to carry into effect what the testator has ordained, for the will of the testator is the law of executors. (2 *Feb. Mej.*

157; *Aiora de Partitionibus, Pars* 1, *cap.* 1, *N.* 9; *id. Pars* 3, *qu.* 24, *N.* 72.)

It results from my investigation that, after the death of his wife as well as before, Alviso had the entire control and right of disposition of the whole *Gananciales;* that no estate vested in the children in the one half of the common property, on the decease of their mother; that they had only a contingent and defeasible interest in it, which could never become perfect until the death of their father, and then, only after the payment of his debts; that Alviso in devising the premises in controversy for the payment of his debts was only carrying into execution what the law would have done without his directions, and that the dispositions contained in his will are legal and valid. It would be a startling doctrine to hold that, on the death of the wife, one half of the common property immediately vested in the children of the marriage, without reference to the payment of the debts contracted by the husband for the benefit of the joint community; and yet to this must we come if the plaintiff's position be correct. The common property should be and is, not one half but the whole, a security for the payment of debts contracted for the common benefit, and also by the husband after the death of the wife, and neither the heirs of the wife nor of the husband have any interest, except in the portion which shall remain after the payment of such debts.

I have examined the questions involved in this case at some length, because there may be many estates in this state the titles to which may depend upon the same or similar principles. The judgment must be affirmed.

Ordered accordingly.

CASE

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA,

IN OCTOBER TERM, 1851.

THE PEOPLE *ex rel.* CASSERLY *vs.* FITCH.

The power of filling vacancies in office, vested in the governor of the state by Article V. section 8 of the constitution of the state, applies only to vacancies occurring under circumstances when the original appointing (or electing) power cannot act. Such power is limited by the period when the people or the legislature can elect or appoint, on the arrival of which his power ceases, and the right of appointment returns to the original appointing power.

The power to fill an office carries, by implication, the power to fill a vacancy, and all necessary authority to carry out the original power and prevent it from becoming inoperative.

An appointment to fill a vacancy in the office of state printer made by the governor during the session of the legislature is irregular and void.

The legislature having elected a state printer, and the state printer previously appointed by the governor, having resigned after the adjournment and during the recess, whereupon the governor appointed a person to fill the vacancy supposed to exist: *Held*, that this second appointment, as well as the former one, was irregular and void.

Under the provisions of law requiring certain officers to file their official bonds with the secretary of state, within a specified period, with the approval of the governor indorsed thereon and signed by him, (*Statutes of California for* 1850, *p.* 74, *sec.* 1, 2, 3,) and declaring an office to be vacated by the neglect of the officer to give the bond required by law within a specified period, ("*Act Concerning Offices*," *passed April* 28, 1851, *sec.* 39,) the failure of the governor to indorse his approval on the bond, does not vacate an office where an incumbent has within the time fixed by law, given a sufficient bond, presented it to the governor for his approval, and deposited it in the office of the secretary of state.

Appeal from the district court of the sixth judicial district, (Sacramento,) before Aldrich, district judge, upon an information in the nature of a writ of *quo warranto* brought on behalf of the relator, Casserly, against Fitch, to determine the rights of the respective parties to the office of state printer. By consent of parties, judgment for the defendant was entered up in the court below; from which the relator, Casserly, appealed.

The statement of facts, as agreed upon, is as follows:—

On the trial of this case the respondent showed for warrant or authority by virtue of which he exercised the duties and filled the office of state printer, a commission from the executive department under the great seal of the state signed by John McDougal, governor, countersigned by W. Van Voorhies, secretary of state, and bearing date, May 2, 1851, appointing the said respondent state printer to fill the vacancy occasioned by the resignation of J. B. Devoe. The respondent further showed that he had, within the proper time, taken the oath of office and given bond which was approved of, in conformity with law.

The relator then proved that on the 1st day of May 1851, the senate and house of assembly proceeded to the election of a state printer, at which election the relator received 21 votes, which was a majority of all the votes cast, and was declared duly elected state printer for the period prescribed by law. And the relator further showed, that he had, within the proper time, taken the oath of office and tendered a good and sufficient bond to the governor of the state, (which bond is now on file in the state department,) in conformity with law. The relator then produced the concurrent resolution hereunto attached and marked ("A") which passed unanimously just before the adjournment of the legislature.

The respondent then showed that Jonas Winchester, who had been regularly and legally appointed state printer, and had held the office for nearly one year,—on the 28th of March 1851, gave in his resignation of said office, which was duly accepted. That on the 31st of March 1851, James B. Devoe was appointed state printer by commission from the governor of that date, during the session of the legislature, and that said Devoe duly

qualified himself by taking the oath and giving the bond provided for by law.

And the respondent further showed that on the 2d day of May 1851, the said James B. Devoe resigned the office of state printer to which he had been appointed as aforesaid, and after the adjournment of the legislature, and that the respondent was appointed as aforesaid after said resignation, and that said respondent has performed the duties and discharged the obligations of said office ever since.

And it was further shown that on the 30th day of April 1851, the legislature passed a bill through both houses which provided for the abolishment of the then existing office of state printer, and creating the office anew: which bill is hereunto attached and marked (B.) which bill did not receive the executive sanction, nor did it become a law by lapse of time.

It was further shown that at the election by which the relator claims title to the office, the respondent was a candidate for election and received 13 votes. The relator also exhibited the certificate of his election as state printer on 1st of May as aforesaid, signed by the speaker of the house and president of the senate.

Eugene Casserly, (the relator,) and *James A. McDougal*, (the attorney general,) for the appellants.

Eugene Casserly stated and argued the following propositions: I. By the constitution of the state, (*Art.* 11, *sec.* 6,) "all officers whose election or appointment is not provided for by this "constitution, and all officers whose offices may hereafter be "created by law, shall be elected by the people, or appointed "by the legislature."

This is the leading general provision of our state constitution on the subject of the choice of officers. It is obvious, from the letter and spirit of that instrument, and the policy of our entire political system, which submits to the ordeal of an election by the people, or their representatives, the lowest as well as the highest officers in the state, that the appointing power of the governor cannot be favored or enlarged by any implication of law.

But that, on the contrary, wherever it is brought in conflict with the right of election, by the people or their representatives, every proper presumption of law should be given in favor of the latter.

II. The office of state printer was one of those "created by "law," "after" the adoption of the constitution. It was the creation of one of the very first laws passed by the first state legislature; and in pursuance of the power granted to the legislature by the constitution, (*Art.* 11, *sec.* 6,) it was made an office purely of legislative appointment, and to be retained entirely within the legislative "control."

The office of state printer, by the express terms of the Act creating it, (an Act passed in the exercise of the full constitutional power of the legislature,) by a long established course of precedents in all the other states of the Union, and by obvious and paramount reasons of public policy—is an office purely of legislative creation, use and necessity, a portion of the machinery of legislation, essential to its full and healthy action, and should be wholly within the legislative control, not only as to the original appointment, but as to all other acts necessary to continue the office within the "control" and supervision of the legislature.

The constitution (*Art.* 11, *sec.* 6,) gave to the legislature plenary powers of prescribing how all officers should be chosen; and they have exerted those powers in the case of the state printer, by making it an office purely of legislative appointment, and to be kept within the legislative "control." (*See Act to create office of State Printer. Statutes of* 1850, *p.* 45, *sec.* 1.)

The duties of state printer have relation almost exclusively with the legislature. (*See Act defining his duties*, *sec.* 1, *Stat. p.* 83.)

Compare special words of Act creating office of state printer: (*sec.* 1, *Stat. p.* 45:) "shall be elected by and under the entire "control of the legislature," with the words of the constitutional provision vesting in each house of the legislature the choice of its own officers: "Each house shall choose its own officers," &c. (*Constitution*, *Art.* 4, *sec.* 8.)

The power of "entirely controlling" the office of state print-

er being given by law to the legislature, all the rights and authority requisite to execute the original power, and prevent it from becoming inoperative, follow by necessary implication of law. This is the leading principle applied to determine the constitutional powers of Congress. (*See Hylton* v. *The United States*, 3 *Dallas*, 171; *McCulloch* v. *The State of Maryland*, 4 *Wheat.* 316; *Dobbin* v. *The Lake Erie Company*, 16 *Peters*, 435; *Gibbon* v. *Ogden*, 9 *Wheat.* 1; *Brown* v. *The State of Maryland*, 12 *Wheat.* 419; *United States* v. *Fiske*, 2 *Cranch*, 358; and see opinion of Chief Justice Marshall in the last case.)

Cotemporanea expositio fortissima est in lege; and the Act creating the office of state printer was passed directly upon the adoption of the new constitution, and by a legislature, many of the members of which were fresh from the labors and discussions of the constitutional convention.

That the intention of the legislature was to retain the office of state printer entirely within the legislative control, is too obvious to require argument; and that they supposed the words of the act sufficient to carry out their intention, is equally manifest. The Act carries with it the strongest force both of contemporaneous and legislative construction which it is possible to imagine.

III. Under the act creating the office of state printer, (*Stat. for* 1850, *chap.* 2, *sec.* 1,) and the Act "concerning offices," (*passed April* 28, 1851, *sec.* 41,) the power to fill vacancies in the office of state printer was in the legislature.

This flows also from the general authority over vacancies, necessarily resulting from the original authority to appoint, from the nature of the office itself, and the uniform course of practice in such cases.

The new Act "concerning offices," passed both houses of the legislature in the midst of the controversy as to the governor's assumed power, and the virtue of his commissions. Section 41 provides:

"Vacancies that may happen in offices, the appointment "to which is vested in the Governor and senate, or in the "legislature, shall be filled by the Governor, during the recess of "the legislature, by granting commissions that shall expire

"whenever the Governor and senate, or the legislature, shall ap-"point a person or persons to fill such offices."

Compare this with the section in the old law for which it was substituted:—

"Sec. 44. Vacancies that may happen in offices, the appoint-"ment of which is vested in the Governor and senate, or in the "legislature, shall be filled by the Governor during the recess "of the legislature, by granting commissions 'that shall expire "at the end of the next session.'"

Evidently, the intention of the legislature in striking out the words "that shall expire at the end of the next session," and substituting for them the words "whenever the Governor and "senate, or the legislature, shall appoint a person or persons to "fill such offices,"—was to meet the constitutional exception, (*Const. Art.* 5, *sec.* 8,) "when any office shall, from any cause, "become vacant, and no mode is provided by the constitution "and laws for filling such vacancy, the Governor shall have "power to fill such vacancy," &c.—and to "provide a mode by "law for filling vacancies," in offices "the appointment of which "is vested in the Governor and senate, or in the legislature,"—and thus settle the then pending controversy between the legislature and the Governor.

The words in the new law—"whenever the Governor and "senate, or the legislature, shall appoint a person or persons to "fill such offices,"—are sufficient to give the power to fill such vacancies.

The principle that whatever the law assumes as having been done, or as to be done, especially if in pursuance of an original power, may rightfully and according to law, be done, is indisputable. It is the converse of the principle that what ought to be done in the pursuance of a rightful authority the law will assume has been done.

It is upon this principle that the power of the President to remove his cabinet officers, Secretary of State, of the Treasury, &c., rests. (*See* 1 *Kent's Comm.* 309; 3 *Story's Comm.* 394–7.)

When a power is inherent (as of the people to vote for the election of officers, or of the legislature to appoint the same)—a

very slight implication of law will suffice to authorize its exertion, for the purpose of giving it effect, or preventing it from becoming inoperative. (*See Henshaw* v. *Foster*, 9 *Pick.* 312–7,) and remarks of Chief Justice Parker:—"If an enlarged sense "of any particular form of expression should be necessary to ac-"complish so great an object as the convenient exercise of the "fundamental privilege or right, (as that of election,) such sense "must be attributed."

The constitution of the United States, and the constitutions of some twenty states of the Union, contain provisions on the subject of filling vacancies in office, which not only bear a striking analogy to those in our constitution and laws, but which by a most remarkable uniformity of expression, imply and assume the power to fill vacancies to be a necessary result of the original power to appoint.

The constitution of the United States, Art. 2, sec. 2, says: "The President shall have power to fill up all vacancies that "may happen during the recess of the senate, by granting com-"missions that shall expire at the end of their next session."

The practical exposition of this provision has been since the foundation of our government, that without any other or further provision of law, the President and senate have, upon the assembling of the senate, filled all vacancies in office, the appointment to which is invested in them; and in like manner both houses of Congress have, upon their meeting, or during the session, filled vacancies in the offices, the appointment to which is invested in them.

For similar provisions, upon which the like practical construction has been put, see the constitutions of the following states: *Maine Const. Art.* 5, *p.* 1, *sec.* 15; *Massachusetts, amendment to Const. sec.* 4; *Connecticut, Art.* 4, *sec.* 20; *New York, Art.* 5, *sec.* 4; *ditto, Art.* 6, *sec.* 1, *Art.* 7, *sec.* 12; *New Jersey, Art.* 10, *sec.* 9; *Pennsylvania, Art.* 2, *sec.* 8; *ditto, Art.* 6, *secs.* 1 *and* 3; *Virginia, Art.* 4, *sec.* 4; *North Carolina, sec.* 20; *Florida, Art.* 3, *sec.* 15; *Alabama, Art.* 4, *sec.* 15; *Louisiana, Title* 3, *sec.* 50; *Kentucky, Art.* 3, *sec.* 10; *Ohio, Art.* 3, *sec.* 1; *Indiana, Art.* 4,

sec. 9; *Illinois, Art.* 3, *sec.* 8; *Michigan, Art.* 5, *sec.* 12; *Arkansas, Art.* 5, *sec.* 15; *Iowa, Art.* 6, *sec.* 8; &c., &c.

Taking into view the uniformity of expression in all these constitutions, and of the practical exposition put upon the provision in so many different states, although in all of them (except Iowa) the constitutional provision is more unlimited (so far as respects the Governor's power) than in our own state, the conclusion is irresistible that, both upon principle and by a long and unbroken current of legislative and judicial authority and precedent, the doctrine is now firmly established, that the power to fill vacancies is part and parcel of the original power to appoint, and can be exercised, as of course, whenever the occasion arises; and that the appointments to fill vacancies, made during the recess of the legislature, or in the intervals between the elections by the people, are mere temporary expedients resorted to *ex necessitate* to prevent injury to the public interests, until the next session of the legislature, or the next election by the people, when the original power comes in play again, and the vacancy is regularly filled.

The same principle evidently runs through the whole of our own state legislation on the subject of vacancies in office. The new Act "concerning offices," passed April 28, 1851, was, obviously from its tenor, designed to provide for all vacancies that might possibly arise, in offices of every class, whether originally appointed—1st, by the governor; 2d, by the governor and senate; 3d, by the legislature; and 4th, elected by the people. Yet it is remarkable that in several instances of offices elective by the people, there is no provision expressly authorizing them to fill vacancies at an election. The fact that the people have the power to fill them is everywhere assumed. (*See sec.* 46 *and* 47 *of the Act.*)

The same principle was applied in the decision of a recent case in New York, analogous to the present. (*Matter of Whiting*, 2 *Barbour*, 513.) The health officer of the city of New York, (an office of immense emolument,) is appointed by the governor and senate; and all vacancies occurring in the office, whether from temporary inability or otherwise, are filled by the

Board of Health of the city of New York; but "the person so "appointed shall hold his office only till such inability be re- "moved, or the sense of the governor, or the governor and "senate, shall be declared." Under this law, Dr. Childs was appointed by the Board of Health of the city of New York to fill a vacancy occasioned by resignation. Soon afterwards Dr. Whiting was appointed by the governor and senate to the same office. Dr. Childs refused to vacate the office, claiming that Whiting had not been legally appointed; in other words, that further legislation was required to enable the governor and senate to make a good appointment to fill the vacancy. The point was overruled on the argument of the case, (which was a proceeding in the nature of a *quo warranto*,) and judgment given for the relator.

If these doctrines are sound, the conclusion is, that the legislature had by law the right to fill the vacancy in the office of state printer; in which case, the constitutional provision relied on by the defendant, (*Const. Art. V, sec.* 8,) has no application: being, by its terms, designed to apply only to those cases where the constitution and laws provide no mode of filling the vacancy; as will be seen by the next point in order.

IV. The constitutional provision, Art. V, sec. 8, was not designed to enlarge the appointing power of the governor, nor to restrict or take away the power of the legislature, or of the people. It undertakes merely to make provision for filling certain vacancies temporarily, until the legislature or the people shall have had an opportunity to act by filling them permanently.

The words of the constitution are:—

"When any office shall, from any cause, become vacant, and "no mode is provided by the constitution and laws for filling "such vacancy, the governor shall have power to fill such "vacancy, by granting a commission, which shall expire at the "end of the next session of the legislature, or at the next elec- "tion by the people."

The object is not to extend the appointing power of the governor in derogation of the rights of the legislature or the

people. By its terms, the operation of the section is limited to those exceptional cases of vacancies, for filling which there is no other "mode provided by the constitution and the laws;" and until "the end of the next session of the legislature, or the "next election by the people." Thus far and no farther the power of the governor extends. Whenever the original appointing power can act, the governor's authority is at an end.

The object of the section is to prevent injury to the public interests for the want of a person to discharge the duties of a public office.

As to the nature of such temporary appointments, and the light in which they are to be regarded, see *Tappan* v. *Gray*, (9 *Paige*, 511,) and remarks of Walworth, Chancellor. The provision of law, (1 *N. Y. R. S.* 123,) under which the case was decided, was analogous to that under discussion.

How this provision of the constitution was regarded by the first legislature, (many of the members of which had been members of the convention, and the whole of them witnesses of the formation of our constitution,) is evident from sec. 44 of the old act concerning officers. The section reads:—

"Vacancies that may happen in offices, the appointment of "which is vested in the governor and senate, or in the legisla- "ture, shall be filled by the governor during the recess of the "legislature, by granting commissions that shall expire at the "end of the next session."

Sec. 45 requires the governor "to lay before the legislature "at the earliest day practicable, a statement of all appoint- "ments made by him since the preceding session, to fill vacan- "cies."

This is the practical exposition by the first legislature of the constitutional provision, and it manifestly proceeds upon the grounds—1. That the governor's power to fill vacancies exists only during the recess; and 2. That when the legislature meet they shall proceed to make regular appointments in place of the temporary ones made by the governor. And for this purpose he is to advise the legislature of all such appointments made by him since the preceding session.

And see *People ex rel. Barbour* v. *Mott*, October Term, 1851, Supreme Court of California.

The construction contended for by the defendant, involves the most irreconcileable difficulties and absurdities, and leaves a large class of vacancies unprovided for, upon the extraordinary theory that when the commissions of the governor expire, the appointing power of the legislature, or of the people, is *not* to take effect.

In other words, we are asked to suppose that the constitution, in allowing the governor to fill vacancies by issuing commissions "to expire at the end of the next session of the legislature "or the next election by the people,"—meant, that these vacancies should *not* be filled by the legislature during its next session—should *not* be filled at the next election by the people.

This is not the only difficulty in the way of this construction. In its terms, the provision is absolute, and the commission issued by the governor is not to expire "until the end of the "next session of the legislature." Thus, the commission of the defendant, issued to him, May 4th, 1851, would not expire until the end of the next session of the legislature—say May 1st, 1852; although the act creating the office of state printer makes his term of office the same with that of the state treasurer and controller; that is, two years ending December 31st, 1851. (*See Stat. of* 1850, *p.* 45–6.) So that a temporary appointment made to fill a vacancy, would give to the incumbent a better title, and a longer term of office by some four months, than if he had been in the first place regularly appointed.

Again: The section being absolute in its terms—under the interpretation sought to be fastened upon it, the governor having power to fill any vacancy by his commission, to last until the end of the next session, if a vacancy should "from any "cause" "happen" during the recess of the legislature, in the office of the secretary of the senate, or of the clerk of the assembly—he would have the right to fasten a creature of his own upon the senate or the assembly, however obnoxious to either house, for the whole of the next session.

The answer to an usurpation of power like this, would

be, of course, that by the constitution "each house of the legis-"lature has the power to choose its own officers," and as a necessary consequence the power to fill all vacancies in those offices.

The analogy in the present case is perfect. By law the legisture has the state printer under its "entire control," and consequently the power to fill all vacancies in the office, except those occurring during the recess.

Hence, there being a mode of filling such vacancies provided by law, the constitutional power of the governor does not apply.

V. The election of a state printer by the legislature, May 1st, 1851, was valid and regular, was made under the existing laws, and holds for the unexpired term.

By its own limitation, Winchester's commission expired on the last day of the session. Devoe, of course, even if regularly appointed by the governor to fill the vacancy occasioned by Winchester's resignation, took no other or greater rights than Winchester had; and his commission expired on the same day with Winchester's, under whom he held, if at all.

Admitting that Devoe was rightfully in the office, the election by the legislature (May 1st, 1851,) took effect upon the expiration of his term, which event took place the following day.

This is the established law of elections, that no matter when held, they take effect upon the expiration of the current term. (*See Pratt* v. *Allen*, 13 *Conn.* 119; *and Easley* v. *Spence*, 7 *Ala.* 500.)

The election was held under the existing laws, and was, of course, for the unexpired term, and until a successor should be appointed and qualified. (*See Stat. of* 1850, *chap.* 2, *sec.* 1; *and Const. Art.* 5, *sec.* 18 *and* 2.)

VI. The election of the relator, May 1st, 1851, being valid, the refusal or omission of the governor to approve his official bond has not vacated his office, nor prejudiced his rights.

The Act creating the office of state printer, (*Stat. of* 1850, *p.* 45,) requires that the printer, (*sec.* 2,) before entering upon the

duties of his office, "shall execute a bond for the faithful and "skilful performance of the work in the penal sum of $10,000, "acceptable to the governor, and payable to the state of Cali- "fornia, which bond shall be deposited in the office of the secre- "tary of state for safe keeping."

The act "concerning official bonds of officers," (*Stat. of* 1850, *p.* 74,) provides, (*sec.* 1,) that the bond of the state printer shall be approved by the governor, and filed and recorded in the office of secretary of state; that (*sec.* 2) such approval shall be indorsed thereon, and signed by the governor; and (*sec.* 3) that the secretary of state shall not file and take charge of the bond until approved as prescribed by law.

The new Act concerning officers, passed April 28th, 1851, provides (*sec.* 39) that an office is vacated by the refusal or neglect of a person elected or appointed to give the bond required within the same time in which he is required to take the oath of office. Sec. 28 provides that "the oath of office shall be "taken and subscribed by every officer (whose oath is required "to be indorsed on his commission or certificate) within ten "days after the reception of his said commission or certificate, "or within ten days after the commencement of his term of "office, if his commission or certificate shall have been receiv "ed by him."

"The time within which the bond is to be "given or ex- "ecuted" is referred by the law to the time of the reception of the commission or certificate.

If from any cause the commission or certificate is not received, the bond need not be executed; and the time for giving it begins to run only from the date of its reception.

This is, of itself, a sufficient answer to any technical objection in reference to the bond.

Admitting, however, that the bond should have been filed, the relator made a substantial compliance with the law. At least, he did every thing in his power to that end.

Supposing the relator bound to file his bond before receiving his commission, the evidence shows a compliance as far as was possible on his part with the requirements of the law. There

having been no laches on his part, the law will not allow him to suffer by the wrongful act of the governor. (*See* 4 *Barb. R. S. C. N. Y.* 621; 1 *Ibid.* 325.)

The truth is, however, that in no event does the failure to file the bond vacate the office. The essential act required is the "giving" or "executing" the bond. (*See Stat. for* 1850, *chap.* 2, *sec.* 2, *and* "*Act concerning offices,*" *passed April* 28, 1851, *sec.* 39, *above quoted.*)

In this case, the relator did "give" and "execute" a bond within the specified time, and "deposit" it (as required by the Act creating the office, section 2,) in the office of the secretary of state. This was a "giving" and "executing" of the bond to the state, and the sureties were liable on it, and the state could bring suit for a breach, with all the rights and remedies which it could have in any case.

Formal defects do not vitiate the bond. See Act concerning official bonds, section 11, (*Stat. p.* 75,) and section 12.

It is only a total omission to give the bond which vacates the office. Any defects or irregularities short of that are cured by law. (*See U. States* v. ———, 1 *Brock.* 195; *Dixon* v. *U. States*, *id.* 177; *Van Deusen* v. *Hayward*, 17 *Wend.* 67; *Ring* v. *Gibbs*, 26 *Wend.* 502; *Speck* v. *Commonwealth*, 3 *Watts & Serg.* 324; *Hester* v. *Keith*, 1 *Ala.* 316; *Whitted* v. *The Governor*, 6 *Port*, 335; *State* v. *Findley*, 10 *Ohio*, 51.)

The relator's bond was "given" and "executed" to the state, when it was deposited in the office of the secretary of state. (*See Apthorp* v. *North*, 14 *Mass.* 167; 2 *Wend.* 615; *State* v. *McAlpin*, 4 *Iredell*, 140; *Young* v. *The State*, 7 *Gill. & Johns.* 253.)

The want of the approval does not vitiate the bond. (*See Stevens* v. *Treasurers*, 2 *McCord*, 107; *Musselman* v. *Commonwealth*, 7 *Barr*, 240; *Moore* v. *State*, 9 *Miss.* 334; *Young* v. *The State*, 7 *Gill. & Johns.* 253; *Davis* v. *Hayden*, 3 *Scam.* 35; *Auditor* v. *Woodruff*, 2 *Pike*, 73; *Taylor* v. *Auditor*, 2 *Pike*, 174.)

And see "Act concerning Official Bonds," &c., section 11, (*Stat. p.* 75,) and section 12.

These considerations respecting the filing, giving, or approval of the bond, have no application in this case; in consequence of the non-receipt by the relator of his commission.

No formal demand of the commission from the governor was necessary, on the part of the relator. The circumstances of the case—the power assumed by the governor, and the issuing by him of a commission to the defendant, May 2d, 1851, constituted a sufficient refusal.

VII. There being no vacancy in the office of state printer at the time of the appointment of the defendant, (May 4th, 1851,) that appointment was invalid.

The relator was elected by the Legislature, May 1st, 1851, and his election (even admitting the validity of Devoe's appointment) took effect immediately upon the close of the session, which occurred between midnight of the same day and the following morning.

There was therefore no vacancy in the office, and the governor's power of appointment, being only to fill vacancies, could not apply. (*See Constit. Art.* V, *sec.* 8.)

Murray Morrison and *Tod Robinson*, for the respondent.

Tod Robinson insisted upon the following points, viz.:—

I. The decision of the court below will be sustained by every legal intendment. It is the duty of the appellant to show affirmatively that the inferior court erred in its judgment.

II. It appears from the statement of the case, that Winchester, the original state printer, was duly and regularly chosen for that office. By the law which then existed, his term of office expired on the 1st of January, 1852.

III. Upon his resignation, if during the recess of the legislature, the successor's term of appointment would expire on the last day of the next session. But the resignation took place during the session of the legislature. By law then, there was no provision, nor is there any now, to fill vacancies happening during the session of the legislature. The constitution declares that when no such provision exists, the vacancy shall be filled

by executive appointment, which appointment shall expire at the end of the next session of the legislature.

IV. Devoe was appointed during the session of the legislature. His term of office would only then expire on the expiration of the original term of office, or at the end of the next session. Now, the next session is the session of 1852. He resigned after the adjournment of the legislature, when the respondent was appointed for the next period. It is not competent for the legislature to legislate a man out of office created by law, other than by abolishing the office itself; or, if it has the power to diminish the term of office, the incumbent would be entitled to the whole of the diminished period subject to the act of legislation; provided it did not extend the duration beyond the term of the original appointment.

V. Now, when Devoe was appointed, his term extended to the next January, as has been shown. The legislature did not abolish the office of state printer, as it was contemplated to do, and in reference to which the appointee was appointed. The legislature did not, nor did they attempt to, limit Devoe's term of office. They left him as they found him, with the right to the office until January, 1852. After the adjournment he resigned, and the respondent was duly appointed.

VI. It was the duty of the appellant to submit such bond as the executive would approve. It is a judicial presumption that the co-ordinate departments of the government will do their duty. And, if the governor has not approved this bond, it must be taken for granted that he refused the approval in the legitimate discharge of his duty, and in the proper exercise of his executive duty, until the contrary appears. Now, the statement of facts does not state on what ground the bond was refused, and the implication is irresistible that the bond was not such as the law requires the officer to give before he can enter on the discharge of his duties, in a controversy between the government and any one claiming title or right to any office. The appellant, if aggrieved in this, is entitled to his remedy in a direct proceeding against or with the executive.

By the Court, MURRAY, J.* From the agreed statement of facts in this case, it appears that Jonas Winchester, who was duly elected state printer, resigned his office on the 28th of March, 1851. On the 31st of March, 1851, while the legislature were in session, the governor appointed James B. Devoe to fill the vacancy created by said resignation. Devoe continued in office until the 2d of May, 1851, after the adjournment of the legislature, on which day he resigned. After the resignation of Devoe, the respondent, (Fitch,) was appointed by the governor, and has discharged the duties of the office ever since.

On the first of May, 1851, an election was held in the legislature for the office of state printer, and the relator, Casserly, received a majority of the votes cast, and was declared accordingly duly elected state printer for the unexpired term of said office, and thereupon he took the oath prescribed by law and tendered his bond of office.

For the respondent it is contended, that Winchester having resigned during the session of the legislature, and there being no provision for filling up a vacancy occurring during the session, the governor was empowered, by the provisions of the 8th section of the 5th article of the constitution, to fill the same,—that the term of Devoe continued until the end of the next session,—that Devoe having resigned after the adjournment of the legislature, the governor had the constitutional and legal power to appoint the respondent, to continue in office until the expiration of the session of 1852.

The relator relies upon his election by the legislature.

The office of state printer was created by an act of the legislature, who retained the power of electing and controlling the same. Section 8, article 5, of the constitution, provides that "When any office shall become vacant, and no mode is pre-"scribed by the constitution and laws to fill the same, the gov-"ernor shall have power to fill such vacancy by granting a "commission, which shall expire at the end of the next session "of the legislature, or at the next election by the people."

* Appointed in the place of BENNETT, J. resigned.

This has in view vacancies in offices where the governor and senate or legislature have the power of appointment, or where they are elective by the people, and provides accordingly; but such power of the governor is limited by the period when the people or the legislature can elect or appoint, on the arrival of which his power ceases, and the right of appointment returns to the proper appointing power. This was the construction in the case of *Barbour* v. *Mott*, (*October term*, 1851, *Supreme Court*,) and is sustained by cotemporaneous legislative exposition. The "Act concerning offices" of April 11, 1850, directs "that when "an office shall become vacant during the recess of the legislature, "the appointment of which is in the governor and senate, or the "legislature, the governor shall grant a commission, which "shall expire at the end of the next session." It thus appears that the legislature placed the same construction upon the constitution, limiting the power of appointment to those cases which might happen during the recess of the legislature, and did not think it necessary to provide for cases occurring when the power that originally filled was in readiness to act. The right of the legislature to elect and control the state printer cannot be defeated by any inference in favor of the appointing power of the governor. The power to appoint to an office carries, by implication, the power to fill a vacancy in such, and all necessary authority to carry out the original power and prevent its becoming inoperative.

We are of opinion that, on the resignation of Winchester, the power of filling the vacancy reverted to the legislature; that the appointment of Devoe, and subsequently of the defendant, was irregular and void; and that the relator was properly elected, and entitled to exercise the rights and duties of the office.

The judgment of the court below must be reversed; and there appearing by the record no cause for a new trial, judgment must be entered that the relator, Casserly, be authorized to take upon himself the office of state printer, and that the respondent, Fitch, be ousted and excluded from the same.

PROCEEDINGS

IN THE

HOUSE OF ASSEMBLY

OF THE

STATE OF CALIFORNIA,

UPON A CITATION TO

LEVI PARSONS, ESQ.,

DISTRICT JUDGE OF THE FOURTH JUDICIAL DISTRICT,

TO APPEAR BEFORE THE ASSEMBLY AND SHOW CAUSE WHY HE SHOULD NOT BE IMPEACHED.

It may not be uninteresting to subjoin to the foregoing volume of Reports a brief account of the proceedings, which led to the attempt to impeach Judge Parsons, and of the proceedings in the legislature thereon.

At the opening of the March Term of the district court of the fourth judicial district in and for the county of San Francisco, Judge Parsons delivered a charge to the Grand Jury, the substance of which is as follows:—

"Gentlemen—You are called here and sworn as grand jurors for this term of this court, and are to sit as the grand inquest for this term; and, in accordance with the statute, it becomes my duty to read to you a portion of the criminal statute of this state. [The court then read to the jury the third chapter of the act entitled 'An act to regulate Criminal Proceedings.'] The court then proceeded to say, that in a mixed population like that of our country, many and various classes of crimes will occur, and be brought before them for investigation, and for presentment to the court for trial; among which, probably, the most numerous would be grand larceny, burglary, assault and battery with intent to kill, &c. [The court then defined these various classes of crime.] The court then proceeded to charge, that our government was a free government, and was founded in the love and respect of the people for such institutions—that it was essentially a government of law, and that the law was the

common protector of all—that it guaranteed the rights of the community as well as the individual from violation, either from individual or combined aggression – that the liberty of the press was essential to the safety of free and popular institutions; but when that liberty degenerated into licentiousness—when it was prostituted to baneful purposes, so as either to produce the disturbance of the public tranquillity, or to slander, or libel individual character, it was the duty of the grand jury to interfere, and present the author of such wrongs to the proper court for trial, so that the ends of justice might be obtained, and a sure guaranty given to the quiet enjoyment of the rights of every person, both as an individual and as a member of the body politic; and on the other hand, it was equally their duty to present any individual, who, through such attacks, may have taken the law into his own hands for the purpose of redressing his own wrongs. For, as I have said before, the law is the common protector of us all, and it is your duty to see its dignity and sacredness preserved. It is also your duty to inquire into the cause of detention of every person imprisoned within the county on a criminal charge. The court then proceeded to say that, from the various classes of business that would be presented, they would see that the grand jury formed a very important branch of our government. They should bring to the investigation calm and deliberate minds, and should present no person either through fear or favor. That in judging whether they should present a bill or not, they should weigh with care the testimony before them, and if they thought it would justify them, if sitting on a trial jury, to find a conviction, they should then find an indictment, and present the persons so charged for trial."

The morning after the delivery of this charge to the grand jury, an article appeared in the *San Francisco Herald*, of which the following is a copy:—

"THE PRESS A NUISANCE.

"The district judge of San Francisco yesterday gave a charge to the grand jury, and among other queer things advised them to examine the City Press. According to the report of the judge the papers of the town constitute a nuisance, and should be prosecuted as such by the county authorities.

"It is not surprising that the district judge should consider the press in this light after the strange position he has taken in regard to the evidence necessary to justify the grand jury in finding a true bill. The district court, 'learned in the law,' as the constitution liberally provides, has charged the grand jury that a bill should not be found unless they deem the evidence sufficient to make a petit jury convict. Thus the district court instructs the grand jury to aid the escape of criminals; for how can the grand jury exercise its own peculiar duties and also perform the functions of a petit jury? No wonder that after laying down the law favorably to the criminals the district judge should declare against the press.

"The old phrase of 'judicial madness' is daily assuming a new and intense meaning in California. Our courts seem determined on 'fooling' the people 'to the top of their bent;' and like the Hindoo in the phrenzy of superstition they fling themselves under the wheels of the Juggernaut, public opinion, in order that they may be crushed beneath the sacred car. They cover crime with the folds of the ermine; they lift their impotent arms to scourge an unfettered press with the rods of justice, as they style it. They drop the tears of a bastard mercy upon the robbers and the assassins who threaten our lives and our property; they turn with a scowl of wrath and an arm of vengeance upon the press which dares to complain of the tenderness with which offenders are treated.

"If we err not, Judge Parsons was present in many of the scenes which passed before the City Hall some ten days ago. He may have observed the deep discontent with which the people listened to him when he counseled them to leave the prisoners Stuart and Wildred to the regular courts of the state. He may have heard the curses—not suppressed even by his presence—uttered against the courts as now organized and constituted. If the judge could hardly stand before the people when he appeared merely as counsel for other parties summarily arraigned before the people in mass assembled, how much weaker would he be if called on to plead his own cause before an outraged and indignant public? If we were the guardian angel of the district judge, we would whisper in his ear, 'Beware!'

"How can men be so blind or so weak as some of our judges appear to be? Do they think the patience of the people eternal because judgment against an unfaithful servant is not executed speedily? Do they dream that the public will for ever remain quiet; that the air will be for ever mild, the breezes forever gentle, and that the hurricane will never rise to sweep them from the land and bury them in the deep? Again we say to the judges, one and all, 'Beware!'"

Upon the appearance of this article the district judge ordered a rule to be entered requiring John Nugent and William Walker, the editors and proprietors of the *San Francisco Herald*, to appear and show cause why they should not be attached for contempt of court on account of the publication of the above article.

On the 7th day of March, 1851, the rule being returned served on William Walker, he appeared and moved the court for twenty-four hours to answer, which was granted. At the adjourned hour the defendant appeared in person, and by his counsel, Edmund Randolph and C. T. Botts, Esqrs., and moved to discharge the rule on the following grounds:—

"First. That no charge has been made against him, no affidavit has been filed as required by law.

"Second. That if he stands charged of the publication in question, he can-

not be held to answer, because there is no specification wherein the said publication is a contempt of this court.

"Third. That admitting that he wrote and published the said publication, there is nothing therein contained for which he can be held to answer by process of attachment, for contempt of court."

The district attorney of the district of San Francisco having been heard in support of the rule, the district judge delivered the following opinion:—

JUDGE PARSONS' OPINION.

"This cause came on for a hearing before the court on the morning of the 8th of March. The matter charged upon defendant Walker, is for editing and publishing in a newspaper called the *San Francisco Herald*, under date of March 4th, a certain article entitled, 'The Press a Nuisance.'

"The defendant appeared before the court in person and by counsel, in answer to the alternative rule served on him by the sheriff of the county. Defendant moved, by his counsel, for a discharge of the rule upon various grounds:—

"First. That the matter was not regularly before the court, no affidavit or complaint having been filed, charging defendant with any matter constituting a contempt. Although that is the mode in which such matters are sometimes brought before the court, yet it is not imperative to follow that mode. Contempts in the presence of the court are made subjects of contempt without previous proof. All other contempts may be pursued as at common law, that is by rule to show cause, followed by attachment, or by attachment absolute in the first instance. (*People* v. *Nevins*, 1 *Hill*, 168.) In that case, decided by Judge Cowen, the learned judge says, 'Among the requisites to acquire jurisdiction in matters of contempt, is the presence of the defendant in open court, either voluntarily or by compulsion, under process of attachment, and on his appearing, the court has power to fine and imprison until the fine be paid.'

"The motion to discharge the rule was overruled. The counsel for the defendant then moved for its discharge on the ground that the proceeding was against the constitution of the state of California, and against the 13th section, chapter 33, of the statutes of California.

"The clause of the constitution of the state of California referred to, was section 3d of article 1st, in regard to the trial by jury. This clause is in terms almost precisely similar to the clause of the constitution of the United States, in relation to trial for crimes. This question came up for adjudication before the United States court, in the case of *Hollingsworth* v. *Duane*, (*Wallace*, 77, 105,) and it was expressly held 'that it did not take away the right of courts to punish in a summary manner for contempts.'

"Again, it is urged at bar, that this proceeding was in contravention of the 9th section of article 1st of the constitution of our state, which declares 'That every citizen may freely speak, write and publish his sentiments on all subjects,

being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press.' This clause follows almost precisely in language a similar clause in the constitution of the state of New York, and it has never been held that this forbade the courts to punish in a summary manner for contempt. Again, the section of the act organizing the District Court, section 13, before referred to, it is insisted at bar, takes away the power of the court to punish any contempt, except those enumerated in that section. That section does not say what shall or shall not be a contempt. The section is in derogation of the common law, and must be construed strictly.

"And the principle of '*Expressio unius est exclusio alterius*,' applied to this statute, renders it necessary for the courts to apply the punishment there mentioned to all contempts, both those enumerated in that section and those not enumerated. Again, we think this is the construction given to the section by the supreme court of our state, in case of *Field* v. *Turner*, and if that be so, the district court is bound to obey it.

"Again, it is insisted that it was impossible to commit a contempt by editing or publishing any thing libelling or insulting the court, or otherwise. That the court must resort to the grand jury for its remedy. This would seem to be ridiculous that a court, or the judge, the highest officer of the court, should be compelled to resort to the grand jury, officers of his own court, and those officers who are compelled to take the law from him, for his remedy in a case of this kind. Again, this question has been settled, time out of mind, in the English courts and in the American courts, and the power to punish is exercised, we think, in all the states of the Union, unless a statute exists expressly taking away from the courts that power. The case of *People* v. *Freer*, 1 *Caines*, 485; the same, 1 *Caines*, 518, decided in New York by a bench, than which few are abler, are cases direct in point. For one moment, let us look at this matter upon general principles. Is it, or not, right that a court should have the power to protect itself from open insult? Our courts and the courts of all common law countries, are peculiarly constituted. They owe their origin and their existence to the love and the respect of the people for freedom and justice, and consequently every attempt, either by libel or misrepresentation, should be checked, as tending to bring the tribunals of the land, to which every man looks for protection and justice, into disrepute, thereby impairing the force of their judgments; and when the courts lose their moral power, there is no remedy left the citizen to redress his wrongs, but to take the law into his own hands.

"And Heaven forbid that in this American Republic, we should ever see such things. This is not a matter concerning the individual who happens to be for the present presiding officer of this court; but it is the dignity and the position of the district court of the fourth judicial district that is assailed—a court that is established by the constitution of our state, and if the court decides a question of law wrong, it is the duty and the privilege of the party in-

jured to go to the supreme court, and get the matter decided correctly, and the district court will obey. If the law is wrong, then the matter should be represented to the Legislature, our representatives, and if the judge is corrupt, or decides contrary to what he knows to be the law, then the remedy is ample, by way of impeachment; but never should such matter be attempted to be corrected by libelling or attempting to destroy the moral force of the court.

"Chancellor Kent, in the case of *Freer*, 1 *Caines' R.* 518, before referred to, holds the following language:—'Publications scandalizing the court, or intending unduly to influence or overawe their deliberations, are contempts, which they are authorized to punish by attachment, and indeed it is essential to their dignity of character, their utility and independence, that they should possess and exercise this authority.' Again, it is urged here that this will restrict the liberty of the press. Not at all, for they can publish what they like, being held responsible for the same, and this is one of the modes in which they may be held responsible; in this manner, they are responsible to the court; by indictment they are responsible to the people, and, in a private action for damages to the individual.

"It is urged upon us also as a matter of policy that we should discharge this rule.

"Give me leave to say, once for all, that policy never enters into our judgments.

"The constitution does not allow it. God forbid that it should. We are to say what we consider the law to be, and if we do not speak our real opinion, we prevaricate with God and our own conscience. I would not change my judgment when satisfied what the law is on the subject, to gain the favor or avoid the anathemas of thousands. In the language of Lord Mansfield, 'What, am I to fear the "*Mendax infamia*" from the press which daily coins false facts and false motives? The lies or calumny carry no terrors for me.'

"*Mens sibi conscia recti.* I am ready to stand or fall by my own conscience in this matter. If the whole world be wrong and one man right, it is my duty to stand by the one man. Again, if in pronouncing this defendant guilty, I am to bring down on my head the whole artillery of libels, all that falsehood or malice can invent; or that deluded people, frenzied with madness can swallow; nevertheless, it is my bounden duty, if I think him so, to so find.

"This brings me to the conclusion that we have the right legally to inquire into this matter, as to whether it is a contempt or not, and, if we find it a contempt, to punish in accordance with the statute. The motion to discharge the rule is accordingly overruled."

The defendant then had his election to answer written interrogatories to be filed in court, or to file a written answer, and he chose the latter. After being duly sworn he filed his answer in the words following:—

"The defendant William Walker on oath declares: That he is the author of the article published in the *San Francisco Herald* newspaper on the fourth

inst., and entitled, 'The Press a Nuisance;' that he believes the facts stated in that article are true, and the inference drawn therefrom correct; that he wrote and published that article to promote, and not to obstruct, public justice; that he is advised that he has committed no contempt of court.

(Signed) "WM. WALKER."

Upon the defendant's reading and filing the above answer, the district judge remarked in substance, that if there had been any doubt in the first instance, this indelicate and impudent answer put the matter beyond question as to the intent of the defendant. The judge further remarked that the publication in question was a gross libel on the court, and contained charges against the court which, if true, ought to render the court liable to impeachment; and also that it contains direct threats to intimidate the court in the discharge of its duty and to interrupt the course of justice.

The court thereupon adjudged the defendant guilty of the contempt, and fixed his punishment at a fine of five hundred dollars, and ordered him to stand committed until the same should be paid.

Mr. Walker thereupon presented a memorial to the house of assembly praying for the impeachment of Judge Parsons for great tyranny and oppression, in that he had imprisoned said memorialist without shadow of law, or excuse of authority; that through wrath and malice, he had sought to corrupt the administration of justice, and introduce precedents dangerous to the liberties of the state; and that finally with falsehood and deceit he had attempted to explain and palliate the enormities he had desired to exercise and practice.

Upon the presentation of this memorial the assembly appointed a special committee to investigate the charges against Judge Parsons, with power to send for persons and papers, and the result of their labors was reported to the house in the following report:—

"Your committee have, in accordance with the powers granted them, sent for persons and papers, and have carefully examined the charge and accusations preferred against the said Parsons. They have the best of testimony, a judicial record, of the fact, that on the 8th day of March, Judge Parsons, after having summarily cited William Walker to appear before him on a rule to show cause why he should not be attached for a contempt of court, sentenced Walker to pay a fine of $500, and to be imprisoned until the fine was paid. Your committee further learn from the same record, that the contempt of court for which Walker was fined and imprisoned, consisted in the writing and publishing of a certain newspaper article, reflecting on the judicial character and conduct of Judge Parsons. Besides these facts, others were adduced, impeaching the fairness and veracity of Judge Parsons; but these, though strengthening the charges against that judge, are merely accessory to the main facts ascertained and verified by record of the court itself.

"Your committee are of opinion, that, in punishing Walker for the publica-

tion alluded to, and in the manner before narrated, Judge Parsons exceeded the bounds of his authority; that he usurped powers dangerous to the liberties and welfare of the people of this state. If Walker was guilty of an offense in the publication of the article for which he was punished, it was libel; and for this he might have been indicted and put upon his trial before a jury of the country. Judge Parsons was aware of his right to proceed against the author of the article by way of indictment, for he appeared before the grand jury, and complained to them of the publication. But it seems the grand jury did not think proper to find a true bill against Mr. Walker. After the grand jury had refused to act, and after several days' reflection and deliberation, Judge Parsons resolves on the course which ended in the fine and imprisonment of the memorialist Walker.

"In the written opinion which Judge Parsons filed after his judgment in Walker's case, he pretends to derive from the common law the power of punishing for a constructive contempt of court. Your committee are of opinion that the judge should have looked for his power to punish a contempt rather to the constitution and laws of California, than to the maxims of a judiciary deriving its dignity and authenticity from a throne supported by the superstitious respect and awe of a people monarchical in all their habits and prejudices. Nor do your committee find that the people and legislature of California had failed in the passage of laws properly punishing contempts of court. In the act organizing the district courts, the punishment of contempt is provided for; and further than this, contempts are specified and defined. The power Judge Parsons claims is not conferred by the statute; and hence the judge resorts to the common law for a justification and defense.

"The act adopting the common law in this state was not passed until after the act organizing the district court; therefore the section of the last act relating to contempt of court as the judge pretends, is merely declaratory of what the law previously was, for at the time the common law was not the law of California. And even if the legislature had by express words enacted the English doctrine of constructive contempts, such a statute would not have been the law of California. The constitution declares that no law shall be passed restricting the liberty of speech or the press; consequently if the legislature passed such a law, either expressly or by implication, it was unconstitutional and void from the beginning. Without traveling to a foreign country in order to find precedents for the authority he has exercised, Judge Parsons might have found the law of this land nearer home—in the constitution and statutes of California.

"Considering these facts, your committee are convinced that Judge Parsons has been guilty of gross tyranny and oppression in the imprisonment of the memorialist Walker. It remains to inquire whether the judge of the fourth judicial district should be impeached on account of these arbitrary proceedings.

"Your committee find in the state of Pennsylvania, a case which bears almost immediately on the case presented for their consideration. The case is that of Oswald, imprisoned by the supreme court of Pennsylvania, for publishing remarks on a case pending before that tribunal. On the memorial of Oswald, an impeachment was moved in the Pennsylvania assembly, but after long discussion the matter was closed by a vote of censure on the judges of the court. The absence of a statute on the subject of contempt, and the fact—not existing in California—that the common law was the law of Pennsylvania before the state constitution, gave some shadow to the pretence that common law relating to contempt was applicable in Oswald's case. Accordingly the legislature of Pennsylvania, at a subsequent session, passed a statute very similar to the California statute; and the inference to be drawn from the history of Oswald's case is that the assembly would have impeached him if the statute had been in existence.

"The other case is that of Lawless, imprisoned by Judge Peck, the U. S. district judge for the district of Missouri. Lawless was imprisoned for the publication of a newspaper criticism of one of Judge Peck's decisions in regard to Missouri land claims. Peck's excuse was the same as that of Judge Parsons—that a court had a right to punish as a contempt any publication commenting on the decisions of the court. On the memorial of Lawless, the U. S. house of representatives impeached the district judge before the U. S. senate, and it was only after a very able defense, having employed the best counsel in the country, that Judge Peck was able to obtain an acquittal.

"In the view of these facts and precedents, your committee are of opinion that Judge Parsons should be impeached by the assembly. They deem it a duty the legislature owes the people of California, to protest against such an usurpation of power as that claimed by Judge Parsons. Freedom would be but a name, and the elective franchise a farce, if a judge may imprison a citizen who expresses an opinion about his judicial conduct. In the same manner a man might be punished for any publication touching the government, and our jails be filled with those who think boldly and speak openly concerning the conduct of public affairs. At this early period in our history, it becomes us to express our detestation of arbitrary principles and precedents; and your committee recommend that Levi Parsons be accordingly impeached before the senate of California.

"Respectfully submitted,

"WM. C. HOFF, *Chairman, &c.*"

The house of assembly did not adopt the above report, but appointed another special committee, with power to send for persons and papers, and giving the memorialist and Judge Parsons leave to appear before the committee, with such witnesses as each should think proper to produce.

They accordingly appeared before the committee, and numerous witnesses

were examined, and numerous exhibits produced, the latter chiefly by Judge Parsons, and consisting principally of articles from the *San Francisco Herald*, showing the general character of the newspaper in the course it had taken in relation not only to the district court, but to the supreme, superior, and county courts.

After a prolonged and elaborate investigation the majority of the committee reported as follows: accompanying their report with all the testimony taken, and exhibits produced before them.

REPORT.

"MR. SPEAKER :—The select committee of the assembly, to whom was referred the investigation of the charges preferred against the Hon. Levi Parsons, of the fourth judicial district of this state, and to inquire whether the said charges preferred against him are of such a character as to justify, if true, an impeachment; and also whether there is evidence which, unexplained, would sustain the charges, beg leave respectfully to report:—

"That in pursuance of the resolution of the assembly, passed on the 26th of March last, they notified Judge Parsons that his attendance before your committee was required, and with such witnesses as he might think proper to bring. That in pursuance of such notice, Judge Parsons appeared before the committee on the 1st inst., and from day to day until the 4th inst., producing several witnesses whose testimony, in obedience to the resolution, is all taken down in writing, and with the exhibits offered by him, is now reported to this house.

"Your committee also report, that during the examination of the witnesses on the part of Judge Parsons, the memorialist, William Walker, has been present in person, and been permitted to cross examine the witnesses of the respondent as he thought fit. Your committee also report herewith the charges and the evidence therein taken on the part, and in behalf of Mr. Walker.

"It appears to your committee that two distinct propositions are submitted to them for their investigation and report.

"*First.* Whether the charges against Judge Parsons are of such a character as to justify, if true, an impeachment? and

"*Second.* Whether there is evidence, which, unexplained, would sustain the charges?

"Your committee proceed to report upon these propositions in order; and to a clear understanding and full determination of the first one, it will be necessary to ascertain and examine by the constitution and the laws of this state, for what causes a judge of the district court of this state may be impeached. The 19th section of the 4th article of the constitution of California is in these words:—

"'The governor, lieutenant governor, secretary of state, comptroller, treasu-

rer, attorney general, justices of the supreme court, and judges of the district court shall be liable to impeachment for any misdemeanor in office.'

"And 'The act to regulate proceedings in criminal cases,' passed April 20th, 1850, in part 3d, title 1st of impeachments, section 1st, is declaratory simply of the above constitutional provisions; and the subsequent sections under that title only prescribe the mode or manner of proceeding in impeachment cases, and of the trial thereof.

"In answer to the first proposition, we have only to state here the charges in the language of the prosecution, which are as follows, viz.:—

"'For great tyranny and oppression, in that he has imprisoned said memorialist, (Mr. Walker,) without shadow of law or excuse of authority; that through wrath and malice, he has sought to corrupt the administration of justice, and introduced precedents dangerous to the liberties of the state; that, finally, with falsehood and deceit, he has attempted to explain and palliate the enormities he has desired to exercise and practice;' and undoubtedly in the opinion of your committee, if the above charges be true, they would not only justify an impeachment, but would demand the condemnation of the respondent.

"In answer to the second proposition embraced in the resolution of this House, viz.:—

"'Whether there is evidence, which, unexplained, would sustain the charges?'

"Your committee further report, that the conclusion to which your committee have arrived upon this proposition is predicated upon the views they entertain, both of the law and facts of the case; which they beg leave respectfully to present:—

"The power of a court of record to punish for contempts of court, by process of attachment, is inherent in every such court, and in the language of Chief Justice McKean of Pennsylvania, in a case where a newspaper publication was the ground of a proceeding for contempt, 'without such power no court could possibly exist; nay, that no contempt could be committed against us, (the court,) we, (the court,) should be so truly contemptible.' This power has been exercised by the judges of England, and by the federal and state courts in this country. Such is the general rule and such has been the application of it. The question then arises, whether in the state of California this rule has been altered; and if so, how far modified; if it has been, such modification must be found either in the constitution of the state, or the act of the legislature organizing the district courts.

"*First.* As to the constitution of the state, in it there is no regulation, or even mention of the power: but in the act, entitled 'An act to organize the district courts of the state of California,' passed March 16, 1850, your committee find this provision: section 13th, 'The said courts shall have the power to punish in a summary manner, by fine and imprisonment, or either, for contempts

offered to them while in session, or to any process, writ, rule, or order of said court issued and made, or for disobeying any writ, process, or order thereof, or for obstructing or preventing the execution of the same; and the judgments, decrees, and determinations of said courts in such cases shall be *final and conclusive*. No fine shall exceed the sum of five hundred dollars, nor such imprisonment exceed the term of fifteen days for any offense.' The question then is, has the power thus expressly given in this act been abused in this particular case by Judge Parsons?

"The 8th and 9th sections of the 1st article of the constitution of this state have been invoked as limiting the power of a court of record in this state, to punish for a contempt similar to that in the case of Mr. Walker. Like provisions are to be found in the amendments to the constitution of the United States, and in the constitution of the different states in the confederacy; and it never has been questioned with success, that such provisions conflict with the exercise of the power under consideration. The Bill of Rights in the constitution of Pennsylvania declares 'that the freedom of the press shall not be restrained, and that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of the government;' and there is another provision, that the trial by juries shall be as heretofore.

"In the opinion of your committee, these constitutional provisions are as stringent as those in our own constitution, yet Chief Justice McKean, in the case of Oswald, with express reference to the Bill of Rights and the constitution of Pennsylvania, holds the following language:—

"'However the ingenuity may torture the expressions, there can be little doubt of the just sense of these sections; they give to every citizen a right of investigating the conduct of those who are entrusted with the public business, and they effectually preclude any attempt to fetter the press by the institution of a license.'

"Can it be presumed that the slanderous words, which when spoken to a few individuals, would expose the speaker to punishment, become sacred when delivered to the public through the more permanent and diffusive medium of the press; or will it be said that the constitutional right to examine the proceedings of government extends to warrant an anticipation of the judgments of the court; and not only to authorize a candid commentary upon what has been done, but to permit every endeavor to bias and intimidate with respect to matters still in suspense? The futility of any attempt to establish a construction of this sort, must be obvious to every intelligent mind. The true liberty of the press is amply secured by permitting every man to publish his opinion; but it is due to the peace and dignity of society to inquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description it is im-

possible that any good government should afford protection and impunity. If then, the liberty of the press is regulated by any just principle, there can be little doubt that he who attempts to raise a prejudice against his antagonist in the minds of those that must ultimately determine the dispute between them—who, for that purpose represents himself as a persecuted man, and asserts that his judges are influenced by passion and prejudice—wilfully seeks to corrupt the source, and to dishonor the administration of justice.'

"The above sentiments were expressed by the chief justice in a case similar to the one under consideration by your committee; and the chief justice closed his sentence in that case with the following language:—

"'Having yesterday considered the charge against you, we were unanimously of the opinion that it amounted to a contempt of the court. Some doubts were suggested, whether even a contempt of the court was punishable by attachment, but, not only my brethren and myself, but likewise all the judges of England think, that without this power no court could possibly exist—nay, that no contempt could indeed be committed against us, we should be so truly contemptible. The law upon the subject is of immemorial antiquity; and there is not any period when it can be said to have ceased or discontinued. On this point therefore, we entertain no doubt.'

"A memorial was presented subsequently by Mr. Oswald, to the general assembly of Pennsylvania for the impeachment of the judges of the supreme court of that state, for their judgment against him, and the house of representatives, after a full investigation of the case, passed the following resolution:—

"'*Resolved*, That the charges exhibited by Mr. Eleazer Oswald against the justices of the supreme court, and the testimony given in support of them, are not a sufficient ground for an impeachment.'

"Your committee would observe, that this judicial and legislative exposition of the law was made in 1788, by men animated with the purest principles of civil liberty, in laying the foundations of which they themselves had co-operated.

"In conclusion on this point, your committee would observe, that a power similar to that exercised in the case of Oswald, and in the case under consideration, has been exercised by other American judges, both in the federal and state courts of our Union.

"Your Committee are constrained to conclude that there is nothing in the constitution of the state of California, which inhibited Judge Parsons from the exercise of the power in question.

"The remaining inquiry is, whether the 13th section of the act organizing the district courts of this state has that effect. The first clause of the 13th section is the only one which relates strictly to the point; 'The said courts shall have power to punish in a summary manner, by fine or imprisonment, or either, for contempts offered them while in session.' It is to be observed that no definition is given in the clause of the statute, as to what shall be a contempt

of court, further than the limitation that it is to be committed 'while the court is in session.' No definition, therefore, having been given as to what constituted a contempt, it became the duty of the judge to look to the principles of the common law as enunciated by his judicial brethren on the federal and state benches for such definition. This was the only source to which he could look for the contempts enumerated; in the other clauses of the 13th section of the act they were such as may have been committed either during the session of the court, or after its adjournment, or committed either in or out of the presence of the court; nor do the other clauses profess to enumerate all the cases constituting a contempt of court. If those clauses are to be considered as enumerating all the causes of contempt, then would the court be debarred from taking cognizance of the most enormous; such for instance, as that numerous class which constitute a breach of the peace, and which, undoubtedly, are contempts, when committed in the presence of the court; the statute being entirely silent as to any of those. Your committee, therefore, are of the opinion that for having thus adjudicated, Judge Parsons has not rendered himself liable to impeachment. If there be fault anywhere it is attributable to the obscurity of this section of the act, rather than to the interpretation put upon it by the court.

"Your committee also find a case of recent date, bearing somewhat upon the general power in question, having occurred within the last three or four months in the fifth district court in New Orleans. One François Pralon having had a case decided against him, by Judge Buchanan, in that court, sent an offensive letter to the judge. He was brought into court on a *capias* by the sheriff; he did not write the letter, he said, but signed it, knowing its contents; and the only apology he had, being that he sent the communication as from one citizen to another. He was sentenced to pay a fine of fifty dollars, and to imprisonment for ten days for the contempt of court.

"In the discharge of their duty your committee deem it proper to refer to the distinction drawn by Judge Parsons in his answer to the questions propounded by the grand jury, which will be found in the testimony in the case, between the publication of the memorialist, considered as a libel, and a contempt of the court. It appears by the testimony that Judge Parsons, after the attention of the foreman had been called to the article in the *Herald* by the district attorney, appeared before the grand jury to complain of the article as a libel upon his individual character; and that subsequently he treated the article as a contempt of court. In his replies to the question of the foreman of the grand jury, propounded in open court in allusion to this portion of the transaction, Judge Parsons drew the distinction above alluded to, and stated that the publication by the memorialist, considered as a libel upon him, as an individual, was a matter for their exclusive consideration, but considered as a contempt of the court, he as judge had exclusive right to exercise jurisdiction over it, and reiterated in substance what he had previously stated in the argument of the motion to dis-

charge the attachment; that in the exercise of jurisdiction over a contempt of court, it would appear to be absurd or ridiculous for the judge to go before the grand jury (inferior officers) in the consideration of such a question. To justify the distinction taken by Judge Parsons, he referred to the doctrine enunciated in the well known case in New York of Yates *v.* Lansing, which is thus expressed by Mr. Senator Platt:—

"'A contempt is an offense against the court, as an organ of public justice and the court can rightfully punish it on summary conviction, whether the same act be punishable as a crime or misdemeanor, on indictment or not. To challenge a senator or a judge, may, under circumstances, be a contempt, but is certainly indictable. A conviction on indictment will not purge the contempt; nor will a conviction for a contempt be a bar to an indictment. The offense may be double, and so are the remedies and the punishment. For instance, assaults in the presence of the court, rescues, extortions, libel upon the court, or its suitors relating to suits pending; forging a writ, &c., are indictable offenses: and certainly they are also contempts; contempts are never merged into statute offenses, without express words for that purpose.'

"Such being the law of the case, your committee are of opinion that the fact that Judge Parsons called the attention of the grand jury to the publication in the *Herald* as a libel, did not disqualify him from treating it as a contempt of court, and your committee think, that in discarding the idea of going before the grand jurors, treating them as officers inferior to the presiding judge, while considering the publication of Mr. Walker as a contempt, furnishes no ground for impeachment against Judge Parsons.

"The remaining question to be considered by your committee, is, whether the publication in the *Herald*, which was the foundation in the proceeding on the part of the district judge, was a contempt of court. By exhibits attached to the testimony in the cause, furnished by the respondent, it will be perceived, that from the third day of December, down to the fourth of March last, when the article in question was published, a series of articles appeared from time to time in the columns of the *Herald*, relating to the courts, and the judiciary of the state. The tendency of these articles, your committee leave to the judgment of the house, and they are reported with the testimony as affording some light by which to ascertain the motives of the memorialist, in the publication of the article in his columns of the fourth of March, as well as those of the district judge, in the steps taken by him in relation to that article.

"Your Committee come to the consideration of the article last referred to, at the opening of the court. The judge of the fourth judicial district gave a charge to the grand jury, a copy of which, sworn by three witnesses (one of them, the foreman of that body) to be substantially that which was given, is reported herewith. On the day following, (4th of March,) there was published in the *Herald*, an editorial entitled "The Press a Nuisance." It is to be observed that at the time this publication was made, the matters which the grand

jury had in charge were in suspense, awaiting their deliberation and final action. Your committee select from the publication made at such time, the following clauses:—

"'Thus the district court instructs the grand jury to aid in the escape of criminals: for how can the grand jury exercise its own peculiar duties, and also perform the functions of a petit jury? No wonder that after laying down the law favorably to the criminals, the district judge should declare against the press. The old phrase of "judicial madness" is daily assuming a new and intense meaning in California. Our courts seemed determined on "fooling" the people "to the top of their bent;" and like the Hindoo in the phrensy of superstition, they fling themselves under the wheels of the Juggernaut, public opinion, in order that they may be crushed beneath the sacred car. They cover crime with the folds of the ermine: they lift their impotent arms to scourge an unfettered press with the rods of justice, as they style it. They drop the tears of a bastard mercy upon the robbers and assassins who threaten our lives, and our property, They turn with a scowl of wrath, and an arm of vengeance upon the press which dares to complain of the tenderness with which offenders are treated. If we err not, Judge Parsons was present in many of the scenes which passed before the City Hall, some ten days ago. He may have observed the deep discontent with which the people listened to him when he counselled them to leave the prisoners, Stuart and Wildred, to the regular courts of the state. He may have heard the curses—not suppressed even by his presence—uttered against the courts as now organized and constituted. If the judge could hardly stand before the people, when he appeared merely as counsel for other parties summarily arraigned before the people in mass assembled, how much weaker would he be if called on to plead his own cause before an outraged and indignant public! If we were the guardian angels of the district judge, we would whisper in his ear "Beware." How can man be so blind or so weak, as some of our judges appear to be? Do they think the patience of the people eternal, because judgment against an unfaithful servant is not executed speedily? Do they dream that the public will for ever remain quiet, that the air will be forever mild, the breezes forever gentle, and that the hurricane will never rise to sweep them from the land, and bury them in the deep? Again we say to the judges, one and all, "Beware."'

"In the then state of the public mind, and while the grand jury had under deliberation the charge of the district judge, containing matters affecting the criminal laws of the country, your committee cannot but believe, that the publication in question was calculated to impair the confidence which should exist between the judge and grand jury, and seriously affect the administration of those laws. Thus viewed, your committee regard it a contempt of court and in view of the consideration which they have brought to the notice of your honorable body, and of the testimony which accompanies this report, your committee recommend for your adoption, the following resolution:—

"*Resolved*, That the charges exhibited by Mr. William Walker against Judge Parsons, of the district court of the fourth judicial district of this state, and the testimony given in support of them show no cause for impeachment.

"Before concluding the duties which have devolved upon your committee, though it may not be deemed within the appropriate sphere of those duties, from the examination they have given the law in this case, they are induced to recommend the passage of a law, more explicitly defining contempts of court, and the power of courts to punish them. All of which is respectfully submitted.

D. P. BALDWIN,
HIRAM P. OSGOOD,
SAMUEL A. MERRITT."

The resolution reported by the majority of the committee was adopted by the house. The minority of the committee made a separate report, but it has not come into the hands of the reporter. The charges against Judge Parsons were dismissed.

APPENDIX.

THE ALCALDE SYSTEM OF CALIFORNIA.

This is the name generally given to the legal and judicial system that existed in California, prior to the adoption of the state judiciary. But so confused are the notions entertained in relation to that system, that a brief account of it may not be deemed inappropriate.

It is said, and perhaps truly, that for a long time the law and the administration of justice in California were in the hands of the *Comandantes* of the *Presidios* (Forts) and of the *Padres* of the missions. Their opinion of the very right of each individual case was the law for the time being. And, perhaps, for the wants of an unlettered peasantry on the extreme borders of civilization, it was much better law, and better adapted to their condition, than the ponderous tomes, and complicated refinements, of the civil law. But early in the history of California appeared that class of magistrates, which occupy so conspicuous a place in all Spanish countries—Alcaldes.

The Al-Caid, or village Judge of the Moors, never enjoyed greater license in the administration of justice among the "faithful" than did the Spanish Alcaldes in remote villages. Yet, Alcaldes were generally popular with the people. So far as they exercised the functions of a court, the pleadings before them were oral, and their proceedings were summary and without appeal in all small matters. Their ready disposition of litigation, brought before them, strangely contrasted with "the interminable and long drawn out" proceedings of Spanish Courts of Record.

Another cause of their popularity was, their position under the law, as amicable compounders, and conciliators of disputes, whose friendly offices must be invoked, before a litigious action could be commenced in a Court of Record.

But the highest honor which the Alcaldes enjoyed, was their political position, as head-men of their village. For, having been chosen by their fellow townsmen, as first councillors of their municipality, they exercised *ex officio*, the office of Justice of the Peace, when there was no such officer in their several villages, and like that officer the Alcalde became, or might become, Judge of First Instance, during the temporary vacancy of that office. And it is a mooted question, whether Alcaldes were not Judges of First Instance, *ex officio*, in all "jurisdictions," where Courts of First Instance had not been organized. The

Cortez of Spain of the year 1812, multiplied immensely this grade of officers, by extending municipal privileges to the whole population of the Spanish dependencies. When the population did not amount to fifty inhabitants, several hamlets and the rustic population were grouped together until a population of fifty inhabitants was obtained. And there was organized the lowest order of an *Ayuntamiento*, which consisted of an Alcalde, a Regidor, and a Syndico. If there was no Justice of the Peace in the bounds of this rural municipality, the first municipal officer was *ex officio* a Justice of the Peace. Such is substantially the legal position of Alcaldes in Mexico at the time of the adoption of the constitution of the year 1837. And what they legally were, or ought to have been, after that time, can be seen from the following extracts from the decree of March 20th, 1837:—

"SECTION VI.

Of the Alcaldes.

Art. 1. The Alcaldes in the places of their usual residence, will take care of good order and public tranquillity.

Art. 2. They will watch over the execution and fulfilment of the police regulations, laws, decrees, and orders which may be communicated to them by the Sub-Prefects, or in their defect, by the Prefects, and they will duly circulate them to the Justices of the Peace of the Municipality.

Art. 3. For the fulfilment of the objects mentioned in the preceding articles they will ask for the necessary force from the Military Commandant.

Art. 4. In defect of such force, or if it should not be sufficient, and any citizens should ask assistance in order to secure their persons or property when they are in danger, and in general for the security or apprehension of criminals within their jurisdiction, and for the preservation of public order, they will call upon the citizens, who are strictly obliged to obey them, the same as any other public authority.

Art. 5. They will cause the culprit, *in flagrante*, to be secured and within three days will put him at the disposal of the competent Judge.

Art. 6. They will see that the residents of the place live by useful occupations, and they will reprimand the idle, vagabonds, persons of bad conduct, and those who have no known occupation.

Art. 7. Those who through drunkenness or any other motive, disturb the public tranquillity, or who disobey them, or are wanting in respect to them, they may on their own authority fine to the amount of $25, to be applied to the municipal funds, or they may sentence to four days of public works, or double the time of arrest, taking into consideration the circumstances of the individuals, and giving them a trial in case they may require it: but with respect to crimes designated by law the existing regulations must be observed.

Art. 8. Should any one consider himself aggrieved in the case of the

preceding article he may appeal to the immediate superior, who will definitely determine what he may esteem just.

ART. 9. They will assist and have a vote at the session of the Ayuntamientos, and they will preside over them according to the order of their appointment when neither the Prefect nor Sub-Prefect assists, and when they do preside their vote shall be decisive.

ART. 10. The temporary absence of the Alcaldes will be supplied by the Regidores according to the order of their appointment. The same will be practised in case of death, &c., until the person be elected who is to succeed them."

Clearly, by this Act, Alcaldes were not constituted judicial officers. The only town in California legally entitled to this class of Magistrates, was the capital, Monterey; as there was not a town in California which contained a population of 4000 inhabitants, until long after the annexation of the territory to the United States.

From the same law I extract the following definition of an *Ayuntamiento*; remarking at the same time, that the organization under this law consisted ordinarily of three *Alcaldes*, (1st, 2d, and 3d,) six *Regidores*, and two *Syndicos*.

"SECTION V.

Of the Ayuntamientos.

ART. 1. The Capital of the Department, Ports with a population of 4000 inhabitants, Interior Towns of 8000 inhabitants, Towns which had Ayuntamientos previous to 1808, and those to whom this right is given by special law, shall be entitled to Ayuntamientos or Town Councils.

ART. 2. In order to form a quorum for the transaction of any business, more than one half of the members must be present.

ART. 3. The number of Alcaldes, Regidores, and Sindicos will be fixed by the Departmental Legislature in concert with the Governor, but the first must not exceed six; the second, twelve; and the third, two.

ART. 4. The Alcaldes are to be removed every year, half of the Regidores the same, and when there are two Sindicos, one of them, the first appointed to be first removed; when there is only one Sindico he must be changed every year.

ART. 5. The Alcaldes, Regidores, and Sindicos may be re-elected indefinitely, and no one can refuse to serve without a just cause, approved by the Governor or Prefect, or in case of re-election, when two years have not expired, or if within the same period they have acted in any other municipal situation, or as Sub-Prefect, or Justice of the Peace.

ART. 6. In case of the death or incapacity of any of the members of the Ayuntamiento, others may be elected to supply their places, unless the vacancy should occur within less than three months of the close of the year; in which case the periodical time must be waited for.

Art. 7. If the newly elected should be an Alcalde, he will take the place that was vacant; if a Regidor or Sindico, he will occupy the lowest place, and the others will ascend according to the order of their appointment, until the vacancy be filled up.

Art. 8. In case of the suspension of an entire Ayuntamiento, or part of one, the Ayuntamiento of the preceding year will take its place in the whole or in part as it may happen.

Art. 9. The following persons cannot be members of Ayuntamiento: Officers appointed by Congress, by the General or Departmental Governments, the Magistrates of the Supreme tribunals, the legal judge of the lower court, (*de primera instancia*,) Clergymen, Directors of Hospitals, or other charitable institutions.

Art. 10. The Ayuntamientos, under subjection to the Sub-Prefects, and through them to the Prefects and Governor, will have charge of the police, health, comfort, ornament, order and security of their respective jurisdictions.

Art. 11. They will consequently take care of the cleanliness of the streets, market places and the public squares.

Art. 12. They will see that in each town there be one or more burying grounds conveniently located.

Art. 13. They will watch over the quality of all kinds of liquors and provisions, in order that nothing unsound or corrupted be sold.

Art. 14. They will take care that in the apothecary shops, no rancid or adulterated drugs be sold, to which end they may appoint intelligent persons of the faculty to examine them.

Art. 15. They will see that marshes be drained, and stagnant and unhealthy waters be made to run off, and everything which tends to injure the health of men or cattle be removed.

Art. 16. They will likewise take care of prisons, hospitals, and establishments of public beneficence which are not of private foundations.

Art. 17. The moment that any prevailing sickness makes its appearance in the district of the Municipality, the Ayuntamiento will inform the Sub-Prefect, or should there be no Sub-Prefect, the Prefect, in order that through his means, the necessary assistance may be administered, but this will not prevent the Ayuntamiento from taking in the mean time the necessary steps to cut off or restrain the evil in its commencement.

Art. 18. With this laudable object, they will name a committee of charity, composed of a Regidor or Alcalde, a Sindico, a Physician should there be one in the place, and two residents or more, should the Ayuntamiento think it necessary, according to the extent of the place and the duties to be performed.

Art. 19. The Ayuntamiento will remit semi-annually, to the Sub-Prefect, or in default of him to the Prefect, that he may forward it to the Governor, an account of the births, marriages and deaths in each of these periods, which

must embrace all its district, and mention the sex, age, diseases of which they may have died, keeping in its records a copy of this document.

ART. 20. In order to obtain these data, they may ask them of the parish curates, the Justices of the Peace, the municipality, or any other persons or corporation capable of furnishing them.

ART. 21. In order to attend to the ornament and comfort of the towns, they will see that the market places be well distributed, and that every obstacle, tending to hinder them from being sufficiently provided, be removed.

ART. 22. They will take care of the preservation of the public fountains, and see that there be abundance of water for men and cattle.

ART. 23. They will likewise endeavor as far as possible, to have the streets straight, paved and lighted, and that there be public walks and abundant plantations, for the beauty and health of the towns.

ART. 24. It belongs to them to procure the construction and repairing of bridges, causeways and roads, and to encourage agriculture, industry, trade and whatever they may consider useful to the inhabitants.

ART. 25. At the junction of different roads, they will place inscriptions pointing out the respective directions and distances to the nearest towns.

ART. 26. It belongs to the Ayuntamientos, to make contract for all kinds of diversions, license having previously been obtained from the first local political authority.

ART. 27. The products of these contracts must be paid into the municipal funds.

ART. 28. If the regulations of police and good government should not embrace all the measures which the Ayuntamientos may consider necessary for the preservation of order and the security of persons and property, they may propose to the Governor whatever others they may deem convenient, in order that those which may appear just may be adopted.

ART. 29. They will see that in every town there be a safe and commodious prison, that in said prisons different departments be found for persons arrested and for prisoners, and they will take care that the latter be usefully employed.

ART. 30. They will pay careful attention to the establishment of Common Schools in every town, the masters and mistresses of which must be paid out of the municipal fund, and they will not only be careful to appoint proper persons, but to see that at all times they continue to be of good conduct and of sound morals.

ART. 31. They will distribute with all possible impartiality, the municipal duties imposed upon the citizens, guiding themselves by the existing laws, or by such as may hereafter be made.

ART. 32. They will watch over the arrangement of the weights and measures, agreeable to the laws on the subject.

ART. 33. The Ayuntamientos, and every one of their members, whenever they may be called upon by the Prefect, Sub-Prefect, and Alcaldes, will render

every assistance towards carrying into execution the laws, decrees and orders, and the preservation of public order.

Art. 34. They will have the administration and expenditure of the municipal funds to manage, being guided by the ordinances relating thereto, and having in view the expenses approved by the Government. Within the first two months of the year, they will remit to the Sub-Prefect, or in default of him, to the Prefect, that he may send to the Government, an account with vouchers, of the total amount of municipal funds, and of the direction given them during the preceding year.

Art. 35. The municipal funds will be deposited with such person or persons as the Ayuntamiento may appoint, under its responsibility.

Art. 36. The mal-administration of the funds and the expenditure thereof in expenses not designated by the ordinances of the Ayuntamientos, or which have not obtained the approbation of Government, involve the pecuniary and personal responsibility of each of its members, who may prove to be culpable in its management, or who may have given their votes in the resolutions of said corporation; but those who may not have voted for such resolutions will be free from responsibility.

Art. 37. The Ayuntamientos may appoint at their pleasure a Secretary, and assign him with the approbation of the Governor, who will act in concert with the Departmental Legislature, the salary that may be considered just; but he cannot be removed from his situation without the same approbation.

Art. 38. Should the municipal funds not be sufficient to pay the salary of a Secretary, the Regidores by monthly turns will perform his duties, and they will only be allowed stationery.

Art. 39. The members of the Ayuntamientos on taking office will take the same oath as other political authorities; the Alcalde, or the first one, should there be two or more, will take it at the hands of the Prefect or Sub-Prefect, or in default of both, at the hands of the former Alcalde; and the other members of the corporation, as likewise the Justices of the Peace of the Municipality, will also be sworn in by the Alcalde.

Art. 40. The Secretaries will take the same oath before their Ayuntamientos."

Under this law, a question has arisen in relation to the interpretation of the last clause of *Art.* 1, *Sec.* V. viz. whether "special law" there referred to is to apply to special laws passed before the 20th March, 1837, or to special laws passed after that date. The determination of this question derives importance from the anomalous position of affairs at San Francisco. In 1833, the Departmental (then Territorial) Junta of Upper California passed an act, establishing a Marine *Pueblo* (*Embarcadero*) at *Yerba Buena* (Peppermint) Point on the bay of San Francisco. This act authorized the organization of an *Ayuntamiento*, to meet at the *Presidio*, if twenty-five families, or when twenty-five

families could be collected. Whether an Ayuntamiento ever met or organized under the law, or whether twenty-five families could be mustered, does not appear. But certain it is that by order of General Vallejo, the lines were run to define the limits of this municipality—viz. a straight line from Point *Lobos*, on the Pacific ocean to the mouth of Mission Creek, by the surveyors of the American Exploring Expedition. This territory embraces the most valuable portion of the present city of San Francisco. But whatever may be the legal rights growing out of this act of 1833, to organize the little Pueblo of *Yerba Buena*, long before the arrival of the Americans, it was swallowed up, or rather its population was drawn from it to the more flourishing interior *Pueblo*, located upon its south line, and holding its meetings at the Mission House, and distinguished by the name of San Francisco. And when the *Ayuntamiento* of San Francisco in 1839 made a formal surrender of its franchises, books and papers, (see schedule in county clerk's office,) to Guerrero, J. P. Guerrero assumed jurisdiction over both municipalities, and all of the adjacent territory or district; there not being the requisite population of 1000 in the whole district to constitute him a sole corporator under the act.

Guerrero and his successors in office are often addressed in official papers by the more popular title of Alcalde, while he himself (having some knowledge of the law) confined himself to the limits prescribed to Justices of the Peace and always made use of that title of office. In the year 1839, he solicited of the Governor permission to make grants of land within the limits of the extinct Pueblo of San Francisco, and afterwards he again solicited permission to make grants of building lots within the limits of *Yerba Buena*, both of which requests were granted, as appears by the Prefect's letters now of record.

What the real duties of his office were, will at once be seen by the following section of the act before referred to:—

"SECTION VII.

Of the Justices of the Peace.

Art. 1. The Departmental Legislature and the Governor, having previously heard the opinion of the respective Prefects and Sub-Prefects, and bearing in mind the different circumstances of all the towns and villages of the Department, will determine the number of Justices of the Peace which there should be in each of them; but they must not neglect to establish them in every ward and populous rancheria distant from a town.

Art. 2. The Justices of the Peace are to be named by the Prefect of the District on the recommendations of the respective Sub-Prefects.

Art. 3. In every place of one thousand inhabitants or more, the Justice of the Peace shall have, under subjection to the Sub-Prefect, and through him to the superior authorities, the same faculties and obligations as the Ayuntamientos; but in the management or supervision of the municipal funds, they will

restrict themselves to what may be established in the ordinances to be made by the Departmental Legislature.

ART. 4. These Justices of the Peace, as well as those of places which do not contain one thousand inhabitants; those of the suburbs and rancherias at a distance from towns, and those of the quarters and wards of every populous town, shall have the faculties and obligations granted to and imposed on the Alcaldes in Section VI, Art. 1—6.

ART. 5. In the suburbs and rancherias distant from towns, and in such towns where only a Justice of the Peace is established, a substitute shall also be named in the same manner as the real one, to take his place in case of temporary absence. In other places where there are several Justices of the Peace, they shall during the present year 1837 mutually supply the places of each other. In future this shall be done by the former Justices of the Peace, according to the order of their appointment, beginning with those of the last year.

ART. 6. The Justices of the Peace of those places in which the Ayuntamientos are to cease, will receive, by means of correct inventory, all the documents, books of acts, and whatever may belong to those corporations, and they will remit a copy of it to the Governor that he may send it to the Departmental Legislature."

The following sections from the subsequent act of the 23d May, 1837, further define the duties of Alcaldes, Justices of the Peace, and Judges of First Instance, as the law existed in Mexico at the time of the conquest of California.

"SECTION II.

Of the Courts of First Instance—(Primera Instancia.)

ART. 1. The Governor and Legislature, on the recommendation of the superior Tribunal, shall designate the number of Judges of this Court in the chief town (cabecera) of each district, in conformity with the laws.

ART. 2. Where there is but one judge of first instance to a district, he shall have both civil and criminal jurisdiction; if more than one, these are separate.

ART. 3. Each Court shall have a Clerk and Recorder, (*Escribano y Escribiente,*) and an Executive officer, (*Comisario.*)

ART. 4. The salaries of the Judges and subalterns of this court is fixed by the Governor and superior Tribunal, in concert with the Departmental Legislature, to be afterwards approved of by the General Government. (*a.*)

"(*a*) The salary of the Judge of Civil Courts was fixed at $1,500, with the stipulated fees of office. Governor Riley, in his Proclamation, has signified his intention to pay this salary to the Judge of First Instance in each political district of California."

Art. 5. The Clerks or Notaries (*Escribanos*) of this Court are appointed by the superior Tribunal, on the recommendation of the Judges of the Court; the other subalterns are named by the judges themselves, due notice of these appointments being given both to the Governor and superior Tribunal.

Art. 6. These Judges, on entering upon their duties, must take the usual oath of office. In case of sickness, absence, death, &c., their places may be supplied *ad interim* by persons appointed by the superior Tribunal, with the approbation of the Governor.

Art. 7. No judge of First Instance can act in a civil or criminal case without the Clerk of the Court, (*Escribano*,) except in case there be no such Clerk, or where the case is too urgent to wait for his presence, in which case two witnesses must be called in, and the papers so witnessed must be afterwards turned over to the custody of the Clerk.

Art. 8. The cognizance and jurisdiction of these Judges are limited to the judicial subjects of their territory.

Art. 9. All law suits and civil or criminal causes, of whatever description, shall be brought forward and carried on before the respective Magistrate of First Instance, excepting in cases wherein clergymen and military persons are privileged by the constitutional or other laws in force.

Art. 10. No complaint, either civil or criminal, involving simply personal injuries, can be admitted without proving, with a competent certificate, that conciliatory measures have been attempted, (viz.: by means of arbitrators or *hombres buenos*.)

Art. 11. From the preceding Article are to be excepted, verbal processes; those of contest respecting chaplaincies, (*capellanias colativas*,) and other ecclesiastical causes of the same description, in which the parties interested cannot come to a previous arrangement; the causes which interest the public revenue, the municipal funds of towns, public establishments, minors, those deprived of the administration of their property, and vacant inheritances. In the same manner, no conciliation is to be attempted for the recovery of any kind of contributions or taxes, whether national or municipal ones, nor for the recovery of debts which have the same origin. Neither is it necessary in the trial of summary and very summary interdicts of possession, the denouncement of a new work, or a retraction; nor in promoting the faculty of inventories and distribution of inheritances, nor in other urgent cases of the same nature; but should a formal complaint have to be afterwards made which would cause a litigious process, then conciliation ought first to be attempted, but it must not take place in cases of bankruptcy where creditors sue for their dues; but it shall take place when any citizen has to demand judicially the payment of a debt, although it may arise from a public writing.

Art. 12. In the trial of causes which exceed one hundred dollars but do not exceed two hundred dollars, the Judges will take cognizance by means of a written process according to law, but without appeal; nevertheless the parties

may take advantage of the appeal of necessity before the superior Tribunal, should the laws have been violated which regulate the mode of proceeding. This appeal shall be referred to the same Judge, in the terms and for the purpose mentioned in Art. 20 of Sec. IV.

ART. 13. Any person who may be despoiled of or disturbed in his possessions, whether the aggressor be an ecclesiastic, a layman, or a military character, will apply to the legal Judge for restitution and protection; and cognizance of these matters is to be taken by means of the corresponding very summary process, or even by means of the plenary one of possession if the parties should desire it, with appeal to the respective superior Tribunal; the judgment of property (*jucio de propriedad*) being reserved to the competent Judges.

ART. 14. The Judges of the First Instance, in their respective districts, will take cognizance, by way of precaution, with the Alcaldes, in the formation of inventories, justifications *ad perpetuam*, and other judicial matters of this kind, in which the parties have yet made no opposition.

ART. 15. They will likewise take cognizance of such civil and criminal causes respecting common crimes as may arise against the Alcaldes of their district.

ART. 16. Every sentence of First Instance in criminal causes must be immediately notified to the person who entered the suit and to the culprit, and if either of them shall appeal, said causes must, without delay, be remitted to the superior tribunal, the parties being previously summoned.

ART. 17. If both the accused and culprit agree to the sentence, and the suit should be respecting trivial crimes for which the law imposes no corporeal punishment, the judge will execute the sentence. But if the cause should be one respecting crimes, which have such a punishment assigned to them, the process shall be remitted to the superior tribunal, the time for appealing having passed, although the parties themselves should not appeal, they being previously cited.

ART. 18. In all civil causes, in which according to law the appeal should take place in both effects, and be clearly admitted, the original acts of the process shall be remitted to the superior tribunal at the costs of the appellant, the parties being previously cited, that they may make use of their rights. But if said appeal be merely admitted in the devolutive effect and not in the suspensive one, (*efecto devolutivo y no en el suspensivo,*) the remission must not take place until after the execution of the determination, whatever practice there may be to the contrary.

ART. 19. The Judges of First Instance, in the place of their residence, if there be no superior tribunal there, will in public make the prision examinations required by law; two members of the Ayuntamiento will also be present at the general ones, but without a vote; and every month a report of said examinations will be rendered to the superior tribunal. They will likewise go to the

prison when any culprit asks for audience, and they will hear whatever he may have to say.

Art. 20. The inferior magistrate will also report to the superior tribunal, at furthest within the three days after commencing the causes, all such as they may be forming for crimes committed in the respective jurisdictions. They will likewise send to said tribunal quarterly, a general list of those that they may have concluded in that time, and of such as still remain unfinished in their respective courts, expressing the state in which they may be and the dates of their commencement.

"SECTION III.

Of Alcaldes and Justices of the Peace.

Art. 1. It belongs exclusively to the Alcaldes of the Ayuntamientos and to the Justices of the Peace, in places whose population consists of one thousand or more inhabitants, to exercise in their jurisdiction, with respect to all classes of persons, the office of conciliators.

Art. 2. It likewise belongs to such Alcaldes and Justices of the Peace to take cognizance of, and decide in their respective towns, all verbal processes which may occur, except those in which ecclesiastics and military persons are sued.

Art. 3. It belongs likewise to them, to dictate in litigious cases the very urgent measures that will not admit being taken before the primary judges; and to take, under similar circumstances, the first steps in criminal causes, and also such others as they may be commissioned to do by the respective tribunals and primary courts.

Art. 4. Of the attributions comprehended in the three foregoing articles, the Justices of Peace of such places as do not contain one thousand inhabitants shall only exercise that of taking (whether in civil or criminal cases) such steps as from their urgency do not give time to apply to the nearest respective authorities.

Art. 5. In order to verify the judgment of conciliation, whosoever may have to institute any civil suit, the value of which does not exceed one hundred dollars, or any criminal one respecting serious injuries, purely personal, shall make his complaint to the Alcalde or competent Justice of the Peace, demanding verbally to have the accused party summoned in order to commence the trial of conciliation, and said Alcalde or Justice of Peace will immediately have the summons made out, which must mention the object of the complaint, and fix the day, hour and place, in which the parties have to appear, and both the accuser and the accused are to be told to bring each his arbitrator (hombre bueno), who must be a citizen in the exercise of his rights, and completed his 25th year of age.

Art. 6. The accused party is bound to concur in obedience to the sum-

mons of the Alcalde or Justice of Peace, but should he not do so, a second summons must be sent to him to appear at some newly appointed time, under a penalty of from two to ten dollars fine; and should he still not come forward, it shall be considered that the means of conciliation have been attempted, and that the trial is at an end, (*i. e.* the trial of conciliation,) and the fine imposed upon the accused party shall be irremissibly exacted.

ART. 7. It shall likewise be considered that the means of conciliation have been tried, and that the trial is concluded, if the person summoned appear before the Alcalde or Justice of Peace in obedience to the first or second summons, and say that he renounces the benefit of conciliation.

ART. 8. In the two cases treated of in the two foregoing articles, the corresponding record must be made in the respective book, and be signed in the first case by the Alcalde or Justice of Peace, the Plaintiff and Clerk, (Escribano,) if there be one, and if not by two assisting witnesses; and in the second case, by the Alcalde or Justice of Peace, the Plaintiff and Defendant; and whenever the latter does not make his appearance, but renounces the aforesaid benefit, he must necessarily do it in writing.

ART. 9. When the parties do come forward, either personally or by means of their lawful representatives, to proceed with the trial of Conciliation, the Alcalde or Justice of Peace and the Arbitrators will make themselves acquainted with what the parties have to expose respecting the matter in dispute, and when the said parties retire, the Alcalde or Justice of Peace will hear the opinion of the Arbitrators, and will immediately, or within eight days at farthest, give the sentence which he may consider most fitting to avoid a law suit, and to bring about the mutual conformity of the parties.

ART. 10. Each Alcalde or Justice of Peace shall have a book entitled "BOOK OF CONCILIATIONS," in which he shall note down a concise account of what occurs in the trials of Conciliation, agreeably to what is ordered in the preceding article and in continuation of the Conciliatory Sentence dictated by the Alcalde or Justice of Peace, which must be notified to the parties interested in presence of the Arbitrators, in order that they may say whether they agree to it or not, which must also be noted down and be signed by the Alcalde or Justice, the Arbitrators, and parties interested.

ART. 11. When the parties agree to the sentence, the certified copies of the proceedings which they may ask for shall be given to them in order that the corresponding authority may carry it into effect, and if either of the parties should not agree, the Alcalde or Justice of Peace will give him a certificate that the means of Conciliation have been attempted, but without success; the parties interested merely paying the costs of said certificates in the accustomed form.

ART. 12. In the same Book of Conciliations must be entered the record mentioned in Art. 8, and this Book must remain in the archives when the Alcalde or Justice of Peace conclude the time of their appointment.

Art. 13. The fines mentioned in Art. 6 must be delivered to the respective Treasurers of the Ayuntamientos, in order that the amount of them may go towards paying the expenses of the books which are to be given to the Alcaldes and Justices of Peace.

Art. 14. These Alcaldes and Justices will decide by verbal process the civil complaints which do not exceed one hundred dollars, and the criminal ones respecting trifling injuries and other similar faults that do not merit any other punishment than a slight reprehension or correction.

Art. 15. The plaintiff or complainant who enters any suit of this kind, will apply to the competent Alcalde or Justice, and make his complaint verbally, and this authority will cause the defendant to appear, ordering each party to bring his respective arbitrator with him, who must have the requisites mentioned in Art. 5.

Art. 16. In verbal processes, also, the Clerk (if there be one) will concur, or in his defect two assisting witnesses; and after the Alcalde or Justice of Peace and the arbitrators have made themselves acquainted with the complaint of the one party and the defence of the other, these parties shall retire and the Alcalde or Justice of Peace will hear the opinion of the arbitrators, and immediately or within eight days at farthest pronounce his definitive sentence or decision, which shall be ordered to be carried into execution by the same Alcalde or Justice of Peace, or by any other authority to which a proper certificate of said sentence be presented.

Art. 17. A concise account of the proceedings of these processes shall be entered in a book called "Book of Verbal Processes," and in continuation, the definitive decision or sentence dictated on the subject, and this instrument must be signed by the Alcalde or Justice of Peace, the arbitrators, the parties interested, and the Clerk or acting witnesses. This book shall also be placed in the archives when the Alcaldes or Justices of Peace conclude their term of office.

Art. 18. Against the definitive sentences given in verbal processes, no other appeal can be admitted than that of the responsibility of the Alcaldes and Justices of Peace to the superior tribunal; and in said processes no fees are to be recovered, but merely the costs of the certificates that may be given.

Art. 19. The attributions mentioned in Arts. 4 and 5 must necessarily be exercised by the Alcaldes or Justices of Peace in presence of the Clerks, if there be such, and if not, before two assisting witnesses.

Art. 20. When the subject brought before the Alcaldes or Justices of Peace relates to the retention of the goods of a debtor who wishes to make away with or conceal them, the prohibition of a new work, or other matters of like urgency, the Alcaldes or Justices of Peace will themselves take such necessary steps as may be required to avoid the evils consequent on delay, and they will order the parties interested then to try the means of conciliation.

"SECTION IV.

GENERAL LAWS.

ART. 1. In every criminal suit, the sentence of first appeal (*segunda instancia*) shall cause execution when it is perfectly agreeable to the first sentence, or if the parties agree to it.

ART. 2. In criminal causes there cannot be less than one appeal (*dos instancias*) even when the accuser and the culprit agree to the first sentence.

ART. 3. All witnesses to be examined in any civil or criminal cause must necessarily be examined by the proper tribunals or magistrates which have cognizance of said causes, and if they should reside at other places, they must be examined by the Magistrate or Alcalde where they live.

ART. 4. Every person, of whatever class, privileges, or condition he may be, when he has to give his declaration as a witness in a criminal cause, is obliged to appear for this purpose before the Magistrate who has cognizance thereof, without the necessity of previous permission from his chiefs or superiors.

ART. 5. The confrontation of witnesses with the culprit shall only be practised when the Magistrate considers it absolutely necessary in order to find out the truth.

ART. 6. Both the confrontation mentioned in the preceding article and the ratifications, are to be made in the process immediately after having examined the witness; the culprit being made to appear in order that he may know him, and the witness summoned in the act of ratification, which must take place immediately after the culprit retires.

ART. 7. If the first steps of the process (*informacion sumaria*) take place before the culprit be apprehended, as soon as he is apprehended and his preparatory declaration shall have been taken, the witnesses which have to be examined must be summoned for the purposes mentioned in the preceding article.

ART. 8. No summons shall be sent which has not some relation to the crime, or which is judged to be useless or of no weight in the business as regards the eliciting of truth.

ART. 9. When the pleas alleged by the culprit have no relation to the crime, or cannot in any way diminish its enormity, or are unlikely or improbable, they shall be left out altogether without receiving the cause on proof (*a prueba;*) in which case the trial (*sumaria*) being concluded, the culprit having been previously cited, and the Attorney General in the superior tribunal, it shall be delivered to the attorney or defender of the culprit for him to answer to the charges in the term of three days, which having taken place the definitive sentence shall be given.

ART. 10. When any criminal escapes he shall not be summoned by edicts or by the public crier; but requisitory letters shall be made out for his appre-

hension and the necessary steps taken for his recovery; in the mean time the trial shall be postponed, except as to collecting proof of the crime and its circumstances; but it shall be resumed when the apprehension takes place.

Art. 11. In cases where the plenary judgment has to be renewed, the cause shall be received on proof for a short time, to be postponed, according to its circumstances, as far as forty days; and only in the case of having to examine witnesses or to receive some other proof at such considerable distances as to make that term not sufficient, it may be postponed for sixty days, without any restitution or other recourse taking place in these terms.

Art. 12. When the criminals interpose an appeal against any interlocutory proceedings, or any other appeal that has to go to the tribunal of second or third instance, the continuation of the cause shall not be suspended; and, therefore, if the original acts which caused the appeal cannot be forwarded, certified copies must be sent.

Art. 13. In all civil and criminal causes the interlocutory sentences must be pronounced within the precise term of three days; and the definitive ones shall be dictated by the superior tribunals within fifteen days after the first stage of the suit (vista) be concluded; and by the judges of First Instance within eight days after finishing the causes.

Art. 14. In trials of property, plenary ones of possession, and any other civil trial wherein the amount disputed shall exceed $4,000, appeal may be made to the tribunal of the third instance if the parties wish it, although the second sentence agree with the first.

Art. 15. In the same trials, if the amount in question be less than $4,000, the sentence of the tribunal of second instance will cause execution, if it correspond exactly with the first, that is if the second sentence neither adds nor takes away anything which alters the substance or intrinsic merit of the first instance; so that neither the condemnation to pay costs, nor any other demonstration of a similar nature, can be called in opposition to said agreement."

It may be proper to add to the foregoing extracts that whenever, by any chance, the office of Judge of Second Instance became vacant, the other Judges of Second Instance of the Department, when sitting *in banco*, and constituting the court of Third Instance, or Superior Tribunal, had power to invite any Judge of First Instance to occupy the vacant seat, and he thereupon became, *pro tempore*, Judge of Second Instance, and also a member of the court of final appeals; while the seat vacated by the Judge of First Instance was filled temporarily by the First Alcalde of the city of his residence. And the office of 1st Alcalde was exercised by the 2d Alcalde, so that the only vacancy practically created was in fact that of 3d Alcalde. This system of advancing officers temporarily has led to the great confusion in titles of Mexican officers.

Such is briefly the legal history of California as derived from books of Mex-

ican law. But what was the fact? In a Department, where revolution and disorder were the rule, and law and order the exception in a few favored portions of the country, the Mexican judiciary consisted of the lowest order of magistrates—justices of the peace, and alcaldes. The Governor in person was the appellate court. When a neighborhood needed the services of a magistrate, an Alcalde was chosen on the spot, and he either acted for a single occasion, or continued to act for a period longer or shorter, according to the good pleasure of those that put him into his precarious office. He generally made his own laws, and aided in executing them. And if he chanced to make an unpopular law, or to make an unpopular decision, or to render himself obnoxious in any way to his constituents at home, it was not always that an appeal was taken to the Governor; but a local *pronunciamiento* displaced the unpopular magistrate, and perhaps a new one would be appointed, who would decide more in accordance with the popular sentiment. This primitive judicial system was afterwards very generally adopted by the American settlers and miners. But as early as 1838, this Alcalde system, with its numberless abuses, had been partially overturned, and Justices of the Peace had been substituted, and an effort made to put into execution the constitutional acts of the Mexican Congress of the year 1837. But before the new system of administration could be brought into complete operation, the Governor was driven out of the country by a party of some 46 Americans, and Don Alvarado, a clerk in the Governor's custom house, at Monterey, was by them made Governor. Don Alvarado was liberal in grants of land to Americans, without much regard to the law on that subject; at least, he was so, until he got his 46 patrons into his power, when he imprisoned them, and afterwards sent them, as prisoners, to Mazatlan.

In 1842 Santa Anna was appointed Dictator of Mexico, but it was especially declared in his appointment, that his acts were only to be provisional, and that they were to be submitted to a constitutional Congress for ratification. Santa Anna sent General Micheltoreno as a sort of Proconsul to California, with authority to do whatever he should deem necessary to restore peace to that distracted Department. Micheltoreno applied to the Americans still remaining in the country, to aid him in his efforts to put down the usurped government. This aid was readily given, on the condition that he would confirm the grants of land made to them by Alvarado.

Micheltoreno put into operation the new Mexican system, so that there were in fact Alcaldes only in Monterey. All the rest of the magistracy consisted of Justices of the Peace, with perhaps the exception of John A. Sutter, "Judge of the District of Sacramento and Nueva Helvetia." Justices of the Peace in obscure places, such as San Francisco then was, oftentimes styled themselves Alcaldes, either from the greater license they could indulge in, under that name, or because it was a more popular title. And some even assumed the title of Judge of First Instance, (1ª *instancia.*) It becomes important to bear in

mind these irregularities, and to recollect that, by the law, there could be Alcaldes only at Monterey: as by a decree of Santa Anna, issued about this time, Alcaldes in California, New Mexico, and Tabasco, were authorized to exercise the functions of Judges of First Instance, which class of Judges, by the Mexican law, had admiralty jurisdiction.

The discussions, that have taken place at the city of Mexico, in relation to the extraordinary powers of Santa Anna, but recently occurred. The question not having been raised before the Supreme Court, the court seems to have felt bound to follow the opinion commonly received, at that time, and to give to those decrees the force of Mexican laws, although some of the most learned *Licenciados* at that city now insist, that they ought not in any instance to have the force of laws, unless they were afterwards confirmed by an act of the Mexican Congress.

It is not necessary for the purposes of this treatise, to discuss the question, now so difficult of solution, whether the Government of Alvarado was sufficiently settled, or his authority sufficiently acknowledged, to entitle him to the character of Governor *de facto*, or whether any of his official acts are to be regarded as the acts of the Governor of the Department of California, nor is it necessary to determine the claims of Micheltoreno to make and to confirm grants of land in a manner different from that prescribed in the existing laws of Mexico, and to exercise legislative functions and to do other acts for which there was no legal sanction. The most liberal construction put upon his extraordinary commission was, that he was a quasi-military Governor. A soldier by profession, he was sent with a military force "to give peace" to a distracted department,—empowered to negotiate as well as to make war. He might do all things lawful for a military Governor to do; but his other acts would seem to require the subsequent approval of the dictator or of the legislature to give them validity.

But the most important event connected with the legal history of California, was the occupation of the country by the Americans on the 7th day of July, 1846. This was followed by the proclamation of Commodore Stockton, annexing California to the United States and granting it a constitution. Though this proclamation was afterwards disallowed, yet American emigrants claimed under it all the rights of Mexican citizens in acquiring land during the war. But the politico-military career of Commodore Stockton, and, also, that of Colonel Fremont, in California, was soon at an end; and then followed them two regularly appointed military Governors, General Kearney, and Colonel, who was afterwards General Mason, the legality of whose acts as military Governors cannot be questioned. But it is more difficult to characterize the administration of General Riley. He was not a military Governor, for the war had ceased before his appointment. The provision in the Mexican constitutional act, which authorized the military *Comandante* of a Department to exercise the office of Governor, in the absence of a civil Governor, could not apply to

him, as the law political of Mexico had terminated in California by the annexation. But without the law political to set in motion the wheels of government and furnish administrators of law, the laws which regulate the intercourse between man and man are dormant—there is an absence of all the machinery that gives them their vitality. So that it may be well said that, during General Riley's administration in California, there was in fact no law existing. Society was without any laws, and had no political existence. The traditional law of the country was the traditional law of the Mexican population, and had never been in existence in that portion of California most densely populated in the times of General Riley; for the reason that, before the American emigration, the northern portions of California had been in possession of hostile Indians, and the Mexicans could not dwell in that portion of the country or even visit it. The written Mexican law, if any existed in California, was in the southern, and not in the northern portions of the territory, and consisted of the traditions and laws of that portion of California inhabited by the Mexicans, and had never been in force in that portion inhabited by Americans. Commercial transactions to an immense amount had been entered into, and large transactions in real estate had taken place between Americans, based upon the laws as they existed in the United States and not in reference to the unknown laws of Mexico. To say that the whole of the *corpus juris civilis Mejicana* was in force throughout all California, and that it was to measure all transactions that were entered into at that time by Americans, would be to invalidate contracts of incalculable amount, entered into without any of the contracting parties knowing that such laws existed. General Riley's government must be sustained on another hypothesis—that it was a necessary and unavoidable usurpation. The commission from the President does not improve the matter, for it was issued without any authority of law.

This usurpation being acquiesced in by the people, as an unavoidable necessity, and the offices which he created, as well as his own office of Governor, having been recognized by the people in the constitutional convention, and by the legislature as well as the laws regulating their duties; the question naturally arises, what were the laws recognized? Did they consist only of the small manual of laws published by General Riley, portions of which are contained in this essay, or of the whole body of the Spanish-Mexican laws?

The obvious answer to this question is—that it was the intention of the convention to recognize the manual published by General Riley, and as a necessary consequence, when any thing appeared obscure or unintelligible in that manual, we were driven to Mexican sources for its elucidation; but this is the utmost limit to which this clause in the schedule of the constitution can be extended. And this small manual was all there was of positive law in California until the meeting of the state legislature; all else was shrouded in a maze of uncertainties. Which was the rule and which was the exception, it is extremely difficult at this late day to determine.

With the establishment of the American military government, the Alcalde system was restored. On every bar, and in every gulch, and ravine, where an American crowd was collected, there an American Alcalde was elected. And there were strange and often conflicting laws in adjoining neighborhoods, depending on the settlers or on the Alcaldes, who made the laws, as the occasion required. The American Alcaldes were generally ignorant of the Spanish language and Spanish laws, but they had learned traditionally that the Spanish Magistrates were in the habit of charging a fee on the occasion of assigning to a new colonist a house lot. A liberal construction of this precedent was the foundation of those extensive transactions in town lots, which proved to be of so much pecuniary advantage to American Alcaldes and Justices of the Peace. The proclamation of General Riley of June 3d, 1849, established a new era in the political and judicial administration of California. He called upon the people in the several districts to indicate, by an election, the persons whom he should appoint as Judges of First Instance and Prefects, and also in districts composed of several primary ones, to indicate the persons who should be appointed Judges of Second Instance.

The Judges of Second Instance, when assembled *in banco*, constituted the Superior Tribunal or Court of Appeals. But neither the Courts of Second Instance nor the Superior Tribunal did any business, except granting a few orders, before they were superceded by the present judiciary. The Courts of First Instance originated a large portion of the cases which went up on appeal to the Supreme Court. Although these were courts organized according to the Mexican system, and their duties pointed out by the small manual of law before referred to, yet the Judges, who presided over them, being mostly common law lawyers, and being entirely unacquainted with Mexican law, they were, in their proceedings, substantially common law courts, and, for the most part, their decisions turned upon common law. But, in the south, there were some Judges who followed the traditions of law common in that region.

Inartificial and rude as was the whole judiciary system, before the organization of the state courts, still it was wonderfully efficient. And it was well for the people of California that it was so. For, an unparalleled immigration had brought with it an unparalleled amount of litigation—an amount of litigation, that at this day appears almost incredible. With the daily accruing causes of legal controversy, crowds assembled at the school-house on the Plaza of San Francisco; where from morning till night the judge of First Instance in civil cases might be seen at the desk dispensing off-hand justice. In front of him sat three or four clerks, conducting the business of the court; while on the bench opposite or standing within the rail was a crowd of lawyers waiting a hearing for their clients, who, with their witnesses, filled the remainder of the room, and formed groups about the door. The crowd was not composed of idlers, but it was the representation of the ordinary accumulation of business

for the day, which was to be disposed of before the adjournment of the court. All were anxious to be heard and to have their several controversies disposed of within the shortest possible time. Speedy justice was more desirable than exact justice, when labor was valued at an ounce of gold a day. And none among the multitude were more desirous for speed than the lawyers, whose compensation would depend much upon a speedy judgment. The moving spirit of the whole scene, the judge, watched all that was done or said; and he seldom withdrew his attention unless to administer an oath for the consideration of a dollar, or to sign an order for the consideration of two dollars. Sometimes he would move his position, but whether warming his uncovered feet at the fire-place, or drawing on his boots, there was the same unalterable attention on his part. But as soon as he comprehended a case, his authoritative voice was heard, closing the discussion, and dictating to a clerk the exact number of dollars and cents for which he was to enter up judgment. And then, successive cases went through this summary process until the day's work was completed. To a jury, in a passenger's case for damages against the Pacific Mail Company, he informed them that they must not bring in a verdict for plaintiff for more than the amount of passage money paid, or he would set it aside. And as for long speeches to juries, they were not allowed. All orders asked for by a respectable attorney were granted *ex parte*—the judge remarking that if the order was not proper, the other party would soon appear and move to set it aside, and then he could ascertain the real merits of the case.

After this manner did the administration of justice, rather than law, proceed from day to day "according to the very right of the case," not only in San Francisco, but substantially in the same way, though on a more limited scale, throughout the interior. Hardly one unsuccessful suitor in a hundred thought of appealing a suit, and if he did so, it was a rare thing that enough material appeared of record out of which to make a correct showing of the case.

But the criminal administration of justice was in a deplorable condition. Judges of First Instance, in criminal cases, were appointed and were authorized to take fees. But from whom? From the criminal and his friends, or from the complaining witness? Either of these alternatives was abhorrent to our American notions. There were no jails, no district funds, or district organization. When the community was aroused at the commission of some flagrant crime, men were found to act voluntarilly as sheriffs and clerks, and volunteers guarded the prisoner. But the whole proceeding was necessarily attended with great delays, and the unavoidable expenses were so exceedingly onerous, that it led to the practice, when the district was large, of trying by a jury, without the aid of a judge, persons taken in the commission of a crime. Such unauthorized trials were called "Miners' Courts," and as many persons engaged in mining were familiar with legal proceedings, "Miners' Courts" were oftentimes conducted with as much regularity in their proceedings as the courts of

law. But it is our duty also to add, that under this name of "Miners' Courts," many monstrous abuses have been perpetrated.

Such is a summary of the legal history of the department of California, and of the California territory. The Common Law was, in later times, for the most part, the rule of decision, but in adjudicating on cases arising out of the territorial courts, the supreme court of the state was obliged to consider the Mexican law when clearly ascertained, and when the same was applicable to the particular case before it for its determination. And it is understood that recently the supreme court has decided, that the whole of the Mexican written law was not in full force throughout California, nor was to be considered as the rule of decision in all cases arising out of commercial contracts. This equitable determination of this vexed question, must render unnecessary a more extended examination of the traditional laws of California, or a more extended discussion of the question as to the extent to which the statutory law of Mexico is to be considered as applicable in this state.

THE MEXICAN APPELLATE COURT IN CALIFORNIA.

We have omitted to say anything of the character of the Appellate Judge under the Mexican *régime*—the only judge in California, above a Justice of the Peace or Alcalde, viz.: the Governor in person, because we preferred to have official documents speak for us. On page 600 of President Taylor's California Message and Documents, (*Ex. Doc. No.* 17 *of House of Rep. of* 1*st Sess. of* 31*st Congress*,) the commander at *Los Angeles* writes to General Mason:—

"Don Pio Pico is about five feet seven inches high, corpulent, very dark, with strongly marked African features; he is no doubt an amiable, kind-hearted man, who has ever been the tool of knaves; he does not appear to possess more intelligence than the rancheros generally do; he can sign his name, but I am informed cannot write a connected letter; hence, as he informed me, he would be compelled to send for his former secretary before he could answer my order or communicate with you, which he advised me he intended doing."

Lest it might be believed that the practice of making ante-dated grants, and afterwards inserting them in the blank leaves of a Record book, originated with an Alcalde of San Francisco, the following extract from page 668 of the same volume is added, from which it will appear, that this California Appellate Judge, "with strongly-marked African features," "who has ever been the tool of knaves," "and cannot write a connected letter,"—this last Mexican Governor of California, who has granted most of the valuable lands about San Francisco, out-stripped Alcaldes in the business of manufacturing ante-dated land grants.

"[Confidential.]

"STATE DEPARTMENT TERRITORY OF CALIFORNIA,

"*Monterey, July* 26, 1848.

"SIR: It is highly probable that the persons who obtained grants or deeds of

sales for land from Pio Pico, just as he was leaving the country, will now, on hearing of his return to California, endeavor to obtain from him certificates that these grants or deeds of sale were not ante-dated. I refer particularly to deeds of sales of lands by Pio Pico which are dated at Los Angeles about the 25th of June, 1846, whereas it is believed he was not in that place between about the middle of June and the latter part of July. Some of these titles purport to be recorded on the corresponding book of records, which book has been abstracted from the territorial archives. There are reasons for suspecting that this volume of records is now in the hands of some one of the holders of these ante-dated titles, and that it is so retained in order to get Pico, on his return to this country, to enter these titles upon the records, or, if they have destroyed the book, to get his certificates that they were entered according to the dates they bear. Something will undoubtedly be sought for from Pico to strengthen their unjust claims to government property.

"It is thought that, if you can establish a friendly intercourse with Don Pio before he can have any communication with these holders of fraudulent titles, you may obtain from him a statement of the real facts of the case. The matter should be acted on with promptness, and will require much care and discretion in its management.

"Very respectfully, your obedient servant,

"H. W. HALLECK,

"*Lieutenant of Engineers, and Secretary of State.*

"Colonel J. D. STEVENSON,

"*Commanding Southern Military District, Los Angeles.*"

But for fear that this specimen of a California Governor may be supposed a rare specimen, we subjoin a sketch of two of his predecessors, quoted from an eye-witness of what he relates, the late T. J. Farnham. (*Farnham's California, p.* 60.)

"In 1836, a Mexican General by the name of *Echuandra* was the Commandant General of Upper California. Some years previous, as will be particularly shown in another place, he had come up from Mexico, and having received the submission of the country to the authorities of that Republic, commenced robbing the Government for which he acted, and the several interests which he had been sent to protect. Nothing escaped his mercenary clutches. The people, the missions, and the revenue were robbed indiscriminately, as opportunity offered. A few of the white population of the country participated in these acts. But generally the Californians were the sufferers."

"A vessel had cast anchor in the harbor of Monterey. General *Echuandra*, not having that honorable confidence in the immaculate integrity of the custom-house officers, which thieves are accustomed to have in one another, placed a guard on board the craft, to prevent them from receiving bribes for their own exclusive benefit. To this the officers demurred; and in order to free their territory from the creatures of one whose conscience would compel him to receive bribes for his own pocket instead of theirs, they sent their own clerk, a young rascal of the country, by the name of *Juan Baptiste Alvarado*, to inform the general that it was improper to suggest, by putting a guard on board, that the officers of the ship which lay under the fort, either intended or dared attempt to evade the payment of duties.

"The General, however, was too well acquainted with his inalienable rights, to be wheedled out of them in this manner; and manifested his indignation toward the clerk, for attempting to obtrude his plebeian presence on his golden

dream, by ordering him to be put in irons. *Alvarado*, however, escaped. He fled into the country, rallied the farmers, and formed a camp at the Mission of *San Juan*, thirty miles eastward from *Monterey*.

"Near this mission lived an old Tennessean by the name of Graham; a stout, sturdy backwoodsman, of a stamp which exists only on the frontiers of the American States. As I have said, this brave man resided near the mission of *San Juan*. To this fine old fellow *Alvarado* made known his peril and designs; whereupon the foreigners assembled at Graham's summons, elected him their captain, an Englishman by the name of Coppinger, lieutenant, and repaired to *San Juan*. A council was held between the clerk and the foreigners. The former promised, that if by the aid of the latter he should successfully defend himself against the acting governor, and obtain possession of the country, it should be declared independent of *Mexico;* and that the law, which incapacitated foreigners from holding real estate, should be abrogated. The foreigners agreed, on these conditions, to aid *Alvarado* to the utmost of their power. The next morning the united forces, fifty foreigners and twenty-five Californians, marched against *Monterey*.

"They entered the town in the afternoon of the same day, and took up their position in the woods, one hundred rods in the rear of the *castello* or fort. About nine o'clock flags of truce began their onerous duties. *Alvarado* came from the woods and took part in the councils. The insurgents demanded the surrender of the Government; whereat the cavaliers of the *Presidio* considered themselves immeasurably insulted. Two days were passed in this parleying without advancing the interests of either party. They were days big with the fate of the future; and who could weary under their dreadful burthens? Not such men as *Alvarado*. He bore himself like the man he was, through all the trying period. He uniformly preferred delay to fighting! He was sustained in this preference by his right hand villain, Captain *José Castro*. Indeed, it was the unanimous choice of the whole Californian division of the insurgent forces, to wit, the twenty-five before mentioned, to massacre time instead of men. For not a single one of them manifested the slightest impatience or insubordination under the delay—a fact which perhaps demonstrates the perfection of military discipline in California. The foreigners differed from their illustrious allies. Graham thought 'two days and two nights a waitin' on them baars was enough.' Accordingly, taking the responsibility on himself, after the manner of his distinguished fellow-statesman, he sent a flag to the *Presidio* with notice that two hours only would be given the Governor and his officers to surrender themselves prisoners of war. The demand of the old Tennessean, however, was disregarded. The appointed time passed without the surrender. Forbearance was at an end. The lieutenant of Graham's rifle corps was ordered to level a four pound brass piece at the *Presidio*. A ball was sent through its tiled roof, immediately over the heads of the Mexican magnates.

"No sooner did the broken tiles rattle around the heads of these valiant warriors, than they became suddenly convinced that it would be exceedingly hazardous to continue their resistance against such an overwhelming force. They surrendered at discretion! *Alvarado* marched into the citadel of government! The Mexican troops laid down their arms! The emblems of office were transferred to the custom-house clerk! When these things had transpired, General *Echuandra* was pleased to say to *Alvarado* with the most exalted good sense, 'had we known that we were thrice as many as you, we should not have surrendered so soon;' thereby demonstrating to the future historian *del Alta California* that he and his friends would either have fought the seventy-five with their five hundred or protracted the siege of bravado much longer.

"The end of this revolution came! The schooner Clarion of New Bedford was purchased, and the *Mexican* officers shipped to *San Blas*. *Juan Baptiste*

Alvarado, customs' clerk, proclaimed *Alta California* an independent republic, and himself its governor.

"Thus upper California became an independent state, and *Alvarado* its governor. The central government at *Mexico* was of course much shocked at such unpolished, ungloved impudence; threatened much, and at last in September, 1837, induced *Alvarado* to buy a ship, send dispatches to *Mexico*, and become *El Gobernador Constitucionel del Alta California*, associated with his uncle, *Vallejo*, as *Comandante General*. After this adhesion to the Mexican Government, *Alvarado* became suspicious of the foreigners who had aided him in the 'Revolution,' and sought every means to annoy them. They might depose him as they had done *Echuandra*. And if vengeance were always a certain consequent of injustice, he reasoned well. The vagabond had promised, in the day of his need, to bestow lands on those who had saved his neck and raised him to power. This he found convenient to forget."

"*José Castro*, a villain with a lean body, dark face, black mustachios, pointed nose, flabby cheeks, uneasy eyes, and hands and heart so foul as instinctively to require a Spanish cloak, in all sorts of weather, to cover them, and his *Excelentisimo*, were among Graham's heaviest debtors.

"Another cause of the general feeling against the Americans and Britons in California was the fact that the *Señoritas*, the dear ladies, in the plenitude of their taste and sympathy for foreigners, preferred them as husbands. Hence *José Castro* was heard to declare a little before the arrest of the Americans and Britons, that such indignities could not be borne by Castilian blood; 'for a Californian *Cavallero* cannot woo a *Señorita* if opposed in his suit by an American sailor, and these heretics must be cleared from the land.' Such were the causes operating to arouse the wrath and ripen the patriotism of the Californians. The vengeance of baffled gallantry bit at the ear of Captain *José Castro*; the fear of being brought to justice by Graham, tugged at the liver of *Alvarado*; and love the keenest, and hate the bitterest, in a soul the smallest that was ever entitled to the breath of life, burnished the little black eyes and inflamed the little thin nose of one Corporal *Pinto*."

The above description may look a little like caricature to persons unacquainted with the interior administration of Mexico. But this is not the case. The writer of this article has seen the government of one of the most important states in Mexico overturned in a single day by a party of *paisanos*, and the government and *Junta* made prisoners; and on the next day there was a counter revolution, and the government was reinstated. In these two revolutions there were not altogether so many lives lost as in a street affray the writer has witnessed in Sacramento city. And if such things occur in the more central portions of the Republic, it is not unreasonable to expect almost any kind of irregularities in so distant and neglected a department as California.

Probably written by R. A. Wilson.

SAN FRANCISCO AND ITS PROVISIONAL GOVERNMENT.

José Jesus Noe was the Mexican Justice of the Peace *of the Jurisdiction of San Francisco*—the territory now occupied by the county of San Francisco, and which embraced within its limits the two petty villages of *Yerba Buena* and *San Francisco*, the former being situated at the *embarcadero*, and the latter at the Mission House—the Mission of *Dolores*. Neither of them contained more than fifteen huts, and those were severally situated within the limits of two several extinct *Pueblos*, which bore their names, yet the *Juzgado* was at the Mission House. The Sub-Prefect of this portion of the First District (District of Monterey) was *Guerrero*, who also resided at the Mission.

But the arrival of an American fleet in the bay of *San Francisco* changed the order of things; and the result was the establishment of the American jurisdiction over San Francisco, and the appointment of one John Brown, as the first American Justice of the Peace. (*See Book B. of Spanish Records.*) Washington Bartlett was soon after appointed by General Kearney as "Magistrate and Justice of the District of San Francisco." Soon after his appointment Mr. Bartlett was authorized by General Kearney to make grants of land according to a certain form, prescribed by General Kearney. (*See form as entered in Book A. of Am. Records of San Francisco.*)

The above order of General Kearney, with the subsequent order to sell at auction the water lots, constitutes the entire foundation of all the American titles to lots in San Francisco. For it was at that time insisted by the American settlers that the Spanish and Mexican laws were not in force. This was the prevailing doctrine for several years, and on this hypothesis the Provisional Government was established and sustained, as will be more fully seen from the following extract from the apology of the Committee of the Provisional Legislature addressed to General Persifer F. Smith. (*California Message and Correspondence*, 1850, *p.* 733.)

"Upon the ratification of peace and its official announcement by Governor Mason it is believed he withdrew from all connexion with the civic relations of the Territory. Consequently, for present security, and in lieu of any legislative action by the United States Congress, the office of Alcalde was continued by the "presumed consent of the people," and without any alteration, except that the right to appeal, sometimes exercised under martial law, and therefore recog-

nized by it, became inoperative. The jurisdiction, power, and duty of the office, partially limited by martial law, without it, became unlimited and irresponsible. The tenure, duty, and property of the office, existing under martial law, without any defined or prescribed rules, was continued so, and the people left without any law, in the adjudication of every civil and criminal issue, *except the mere will of this single officer.* Although elected by the people, being the only judicial officer in the Territory, and having all the public records, both of the Mexican and recent authorities in his hands, without any controlling or superior tribunal either to investigate or punish for any crime or misdemeanor committed by him, or even to compel him to discharge his obligations with his fellow citizens as a private individual, the impropriety of such a state of things was soon perceived and felt to be a most serious evil.

"From the foregoing statement it can readily be perceived that the transition from the right use of power to the abuse of it was easy; and the committee regret to say, that the power of the office has been abused for the purpose of gratifying personal malice, and to promote self-aggrandisement, to the great injury of the people, without their possessing the means to redress it."

Mr. Edwin Bryant was appointed to succeed Mr. Bartlett by General Kearney; and Mr. George Hyde was appointed to succeed Mr. Bryant by Col. Mason, the Rev. and Doctor Leavenworth being his alternate, (2d *Alcalde.*) Afterward Mr. Leavenworth was elected to succeed Mr. Hyde. All of the foregoing Magistrates were commonly styled *Alcaldes,* and often addressed by the title of Judge. And all of them, except John Brown, made extensive grants of land, by virtue of the authority claimed to be vested in them by General Kearney.

These grants were written in bound volumes, called Records of Grants, but without witnesses or any verifications, and without much regularity in the order of dates and pages. Duplicates of such grants were delivered to the grantees, and constituted their titles.

The first American Town Council, being the first Town Council ever elected in San Francisco, was chosen under the administration of Mr. Hyde, was styled Town Council, and was known by no other name. This being before the publication of Halleck's Digest, they seem not as yet to have heard of the word *Ayuntamiento,* and they do not seem to have been aware that thirteen years before there had been an organization by that name at the Mission House. The following is the charter under which they acted, though the election took place before the charter was granted. (*California Message and Correspondence,* 1850, *p.* 378.)

THE FIRST CHARTER OF SAN FRANCISCO.

"Headquarters Tenth Military Department,
"*Monterey, California, July* 15, 1847.

"Sir: There is wanted in San Francisco an efficient town government, more so than is in the power of an alcalde alone to put in force. There soon may be expected a large number of whalers in your bay, and a large increase of your population by the arrival of emigrants; it is therefore highly necessary that you should, at an early day, have an efficient town police, proper town laws, town officers, &c., for the enforcement of the laws, for the preservation of order, and for the proper protection of persons and property.

"I therefore desire you call a town meeting for the election of six persons, who, when elected, shall constitute the town council, and who, in conjunction with the alcalde, shall constitute the town authorities until the end of the year 1848.

"All the municipal laws and regulations will be formed by the council, but executed by the alcalde in his judicial capacity, as at present. The first alcalde will preside at the meetings of the council, but shall have no vote, except in cases where the votes are equally divided.

"The town council (not less than *four* of whom shall constitute a quorum for the transaction of business) to appoint all the necessary town officers, such as treasurer, constables, watchmen, &c., and to determine their pay, fees, &c. The town treasurer, to enter into ample and sufficient bonds, conditioned for the faithful performance of his duties, the bonds to be fully executed to the satisfaction of the town council before the treasurer enters upon his duties.

"The second alcalde shall, in case of the absence of the first alcalde, take his place, and preside at the council, and then perform all the proper functions of the first alcalde. No soldier, sailor, or marine, nor any person who is not a 'bona fide' resident of the town, shall be allowed to vote for a member of the town council."

"AUGUST 13.

"I had written the above, when a press of business came upon me which caused me to lay it aside for the time. I was then unexpectedly called to the south, which has caused a delay in this matter. Since my return, I see by the Californian of the 31st July, that you have organized a council, &c., &c. Now, the council can either stand as it is, or an election be held, as may be deemed advisable. Whatever may be most agreeable to the good people of your town, cannot but be satisfactory to me.

"I am, respectfully, your obedient servant,

"R. B. MASON,

"*Colonel 1st Dragoons, Governor of California.*

"Mr. GEORGE HYDE,

"*First Alcalde, San Francisco, California.*"

This council is remarkable for having passed an ordinance, dispensing with the conditions annexed to all grants of town lots. The history of this resolution is as follows: General Kearney having, in his order for granting lots in San Francisco, prescribed the conditions of building and fencing lots within a year, a large number of valuable lots had been granted to officers of the army on these conditions; but before the designated year had expired, Colonel Mason wished to detail some of the officers at San Francisco on distant duty, against which they remonstrated, as it would involve a forfeiture of their lots. To avoid this difficulty (at the suggestion of Colonel Mason, as it is said), this ordinance was passed. During the administration of Alcalde Leavenworth the inhabitants, for reasons alleged in a foregoing extract, organized an independent government, under the name of "The Provisional Government of the District of San Francisco," which consisted of a Legislative Assembly of fifteen members, three Justices of the Peace, &c. (*California Message and Correspondence*, 1850, *p.* 731.) The following is an extract from the Journal of this body:

"MONDAY EVENING, *March* 5, 1849.

"The legislative assembly of the district of San Francisco met the first time at the Public Institute. Present: Messrs. Creighton, Ellis, Grayson, Green,

Harrison, Hubbard, Hyde, Lemon, Lippitt, Montgomery, Parker, Roach, Smith, Swasey, and Wright.

"The oath of office was administered to the aforesaid members elect by his honor Judge H. R. Per Lee, which was in the following words: 'I do solemnly swear that I will support the constitution of the United States and government of this district, and that I will faithfully discharge the duties of office of ——, according to the best of my ability.'

"Mr. Hyde was then appointed chairman pro tempore.

"The members then proceeded to elect, by ballot, their officers, Messrs. Roach and Smith having been appointed tellers, who, after counting the votes, declared Francis J. Lippitt duly elected as speaker to the house, and J. Howard Ackermann clerk. Accordingly, Mr. Lippitt took the chair.

"On motion, a committee of three were appointed to draw up rules of proceeding, to report at a special meeting to be held on Tuesday evening, at 7 o'clock. Messrs. Harrison, Hyde, and Roach, committee.

"Mr. J. Cade was appointed sergeant-at-arms, and Mr. E. Gilbert printer for the house.

"On motion, a special committee of three were appointed to act in connexion with the judges of the district, to report a code of laws as soon as practicable.

"On motion, Mr. Lippitt was added to the committee. Messrs. Hyde, Harrison, and Creighton committee.

"The following resolution was presented by Mr. Hyde, which, after some discussion, was carried unanimously:

"*Resolved*, That Mr. Frank Ward be appointed the treasurer of the district of San Francisco, to act temporarily until properly superseded by law, and who shall be empowered to receive all bonds, mortgages, notes, and money or moneys now in the hands of any officers existing under the late authority, and report the amount to this house.

"Moved by Mr. Smith, and seconded, that a suitable place be provided in which the magistrates elect may hold a court.

"On motion, a committee of three were appointed to confer with the judges on the subject. Messrs Parker, Wright, and Ellis, committee.

"On motion, the meeting adjourned until Friday evening, 7 o'clock.

"FRANCIS J. LIPPITT, *Speaker*.

"True copy from the minutes:

"J. HOWARD ACKERMAN, *Clerk*."

His honor Myron Norton, after he had qualified as Justice of the Peace issued an order for that purpose and the Records of the town were forcibly taken from the possession of "Alcalde" Leavenworth. And for some time the Provisional Government was a government *de facto*. But General Riley having disapproved of the proceedings and threatened to remove the custom house to Benicia and to close the port of San Francisco, a compromise was entered into, by which the Provisional Government disbanded, and "Alcalde" Leavenworth was restored to power, and he continued to be the only Government at San Francisco until he was superseded in August 1849, by the new government elected under the proclamation of General Riley of 3d day of June of the same year. This new government consisted of Horace Hawes, Esq., Prefect of the newly created District of San Francisco, with A. P. Brismade for Sub-Prefect, of the Town of San Francisco, (to which name *Yerba Buena* had been changed by a vote of the people two years before,) and *Guerrero* for Sub-Prefect at

Dolores or the Mission House. A Town Council or *Ayuntamiento* was also elected, consisting of John W. Geary, First Alcalde, Frank Turk, Second Alcalde; with a council consisting of Rodman M. Price, and eleven others, as Councillors.

Soon after the installation of the above Government, John W. Geary was appointed Judge of First Instance of the District of San Francisco, but on recommendation of the Superior Tribunal of California, as provided by Mexican law, this appointment was modified by Gen. Riley, and Col. Geary's commission was limited to Judge in criminal cases only, and Wm. B. Almond, on the recommendation of the Superior Tribunal, was appointed Judge of First Instance in civil cases only. Some months later, G. Q. Colton was appointed Justice of the Peace at San Francisco, and Mr. Tracy at the Mission, by the Prefect. These Justices of the Peace created a good deal of excitement, by claiming the right to make grants of town lots according to the custom of Spanish Justices of the Peace, and by virtue of the authorization of Gen. Kearney. And on account of the wholesale and reckless manner in which they conducted this lucrative business, they brought lot-granting into disrepute, and also interfered with the lot-granting business of an "ex-Magistrate and Justice." Alcalde Geary made no grants of land under General Kearney's order, but the Town Council over which he presided, and which had assumed the name of *Ayuntamiento* since the publication of Halleck's Digest, made numerous sales of lots at public auction.

The remainder of the history of San Francisco is familiar to most of its present residents. Alcalde Geary, who still held the office of Judge of First Instance in criminal cases, was re-elected, with a Council consisting of Saml. Brannan, M. Crooks, James Haggard, James Graham, Frank Grey, Talbot H. Green, H. C. Murray, A. J. Ellis, Wm. Stewart, Frank Tilford, A. Van Nostrand, and B. R. Buckalew, as Councillors, on the 1st day of January, 1850, and he held his office until April following when he was elected Mayor, and Frank Tilford Recorder, under the Charter of the City of San Francisco, granted by the Legislature. The common council last mentioned will long be famous in the annals of San Francisco. Their Charter gave them full license to run in debt, and so effectually did they avail themselves of this privilege, that before the close of their political year they had accumulated a debt of nearly two millions of dollars, besides expending about $250,000 of taxes.

As the mass of the population of *San Francisco* had arrived in the country after the Territorial Government and the Provisional Government had both been superseded, the foregoing sketch seemed necessary to explain the origin of the application of a Mexican corporate title to a town that had formally surrendered its corporate rights, in due form, thirteen years before; corporate rights which it had enjoyed under an old Spanish "General Corporation law," which law itself had been abolished two years before the surrender.

July, 1852. R. A. WILSON.

REPORT ON CIVIL AND COMMON LAW.

In Senate, February 27, 1850.

The Committee on the Judiciary, to whom was referred the petition of certain members of the bar of San Francisco, beg leave

Respectfully to Report,

That they have had the same under consideration, and have given the subject, of which it treats, that serious attention which its magnitude seems to demand. The petition, praying, as it does, that the Legislature will retain, in its substantial elements, the system of the Civil Law, distinctly presents the alternative of the adoption of the Common, or of the Civil Law, as the basis of the present and future Jurisprudence of this State. A choice between these two different, and in many respects conflicting systems, devolves upon this Legislature; and, we think, we do not over-estimate the importance of the subject, in expressing our conviction, that this choice is the most grave and serious duty which the present Legislature will be called upon to perform. It is, in truth, nothing less than laying the foundation of a system of Laws, which, if adapted to the wants and wishes of the People, will, in all probability, endure through generations to come, — which will control the business transactions of a great community,—which will direct and guide millions of human beings in their personal relations,—protect them in the enjoyment of liberty and property,—guard them through life, and dispose of their estates after death. Actuated by these considerations, your Committee have felt it their duty to submit to the Senate a more full and detailed Report upon the matter referred to them, than they should otherwise have felt themselves justified in doing.

The petition sets out with a description of the gentlemen, whose signatures are affixed to it, as "practising members of the Bar of San Francisco." Your Committee is of the opinion that the judgment of intelligent members of the legal profession upon this subject, is entitled to great weight, and should not be lightly disregarded. We are aware, that it is a somewhat popular doctrine, that, in matters of Law and Legislation, the crude notions of any man, who is *not* a lawyer, are entitled to higher consideration than the reflection and ripe experience of the most profound jurist. According to this creed that magic power, "good common sense," as it is termed, inspires every man who may

happen to be possessed of it, instinctively, and without investigation or study, with a thorough knowledge of an abstruse and difficult science. In short, reduced to its simplest terms, and traced through its legitimate consequences, the proposition is, that the man who is entirely ignorant of a multifarious subject, is more competent to form a just and correct judgment concerning it, than the man who has made it the business of his life to comprehend it in theory and understand it in its minute and practical details. From all such doctrine we respectfully dissent. We hold to the opinion, unpopular though it may be, that a person is best qualified to judge of the matter upon which he has bestowed most examination, and to which he has devoted most study and reflection. We hold that a carpenter may reasonably be expected to build a better house than a tailor, and a tailor stitch a coat more neatly than a house joiner; that a machinist may construct a steam-engine, arrange and adapt its complicated parts, and set them in harmonious motion, with more facility and greater success, than a shoemaker. We even think that an experienced surgeon may amputate an arm or a leg, with as little pain to the patient, and with as much safety to his life, as a wood sawyer; and that a well read and skilful physician may be able to counteract and remove the various "ills that flesh is heir to," as quickly and adroitly as a farrier, or even a quack doctor. And, for the same reasons, we do honestly maintain that a member of the Bar,—who has been educated to the profession which he practises,—who has made law his study and engrossing occupation,—who has bestowed upon it the "*viginti annorum lucubrationes*," — made it the subject of his reflections by day, and of his meditations by night,—traced it through all its ramifications and mysteries,—gloried in its excellence, and regretted its defects,—is quite as competent to form a sound and correct judgment in respect to the wisdom or impropriety of its particular provisions, as well as the beauty or deformity of the whole, as if he had been educated behind the counter, or brought up at the anvil or the plough.

We think, therefore, that the enlightened opinions of the legal profession, when fairly expressed, should go far towards inducing conviction of the policy, or impolicy, of establishing, abrogating, or modifying, a system of laws; and if the petition under consideration be in unison with the settled convictions and real wishes of a large proportion of the practising members of the Bar in this State, we should feel bound to accord to it a very respectful deference.

For the purpose, then, of determining to what extent your Committee ought to consider the memorial as an expression of the sentiments of the Bar, we have taken some pains to ascertain the reasons why this petition happens to be laid before the Senate at the present time. From inquiries made by us, we have learned that, a short time since, a meeting of the members of the Bar of San Francisco was held, for the purpose of taking into consideration the subject of the adoption of the Common, or of the Civil Law, as the substratum of the legal system of the State. We have further learned, that such meeting

was attended by a large portion of the members of the legal profession of that city; that it was adjourned once or twice, in order to enable all to express their predilections; and that, after a somewhat protracted discussion, in which some of the most distinguished of the petitioners took part, resolutions were almost unanimously passed, recommending the Common Law, and requesting the Legislature to adopt it. We understand that these resolutions are now before the Assembly.

There are, according to the best information and judgment of your Committee, not less than one hundred practising lawyers at San Francisco. The names of but eighteen persons are signed to this petition; and thus, the Civil Law comes recommended by less than one fifth of the profession at that place. Your Committee would further suggest that, in their opinion, the disparity existing between the number of those whose choice would be the Civil Law, and of those whose partialities are in favor of the Common Law, is not greater in that portion of the profession practising at San Francisco, than it is throughout the residue of the State. If, therefore, the question is to be affected in any way by the known and expressed wishes of that profession to which the petitioners claim to belong, it must be in favor of the Common rather than of the Civil Law.

We will now proceed to the more immediate examination of the matter of the petition.

But before entering upon the subject in detail, we would premise, that no one for a moment entertains the idea of establishing in California the whole body of either the Common or the Civil Law. There are, in each, principles and doctrines, political, civil, and criminal, which are repugnant to American feelings, and inconsistent with American institutions. Neither the one nor the other has ever been, or ever can be, unqualifiedly adopted by any one of the United States. Thus, in Louisiana, where the Civil Law prevails, and in the rest of the States, in which the Common Law is recognized, great and radical additions, retrenchments, and alterations, have been made in the particular system which each has taken as the foundation of its jurisprudence. The Constitution of the United States swept away at once the entire political organization as well of the Common as of the Civil Law. The several State Constitutions make still further inroads, not only into the political, but also into the civil and criminal departments of both systems; and the statute law of each State eradicates many harsh doctrines, and abolishes many oppressive and tyrannical provisions, and in their place substitutes positive rules of action, milder and more enlightened in their nature, more applicable to our political organization, and more congenial with the cultivated feelings and liberal institutions of our people. But still the great body of each system remains untouched. Such is the wonderful complexity of human affairs—a complexity which must always increase more and more in proportion to the advance of commerce, of civilization, and of refinement—that of the immense multitude

of questions which are brought before courts for adjudication, but very few arise under, or are dependent upon, or can be controlled by, Constitutions or express statutory laws. Examine the reports of the different States, Louisiana amongst the rest, and it will be found that a precise rule has been laid down by statute for scarcely a tithe of the cases which the Courts have been called upon to decide; and it would be a futile attempt to provide, in advance, for every contingency which may occur.

We know it to be a favorite theme of some men, that the entire laws of a community, regulating every variety of business, and defining and providing the penalty for every grade of crime, may be, and ought to be, reduced within the compass of a common sized spelling-book—so that every man might become his own lawyer and judge—so that the farmer, the artisan, the merchant, with this "vade mecum" in his pocket, at the plough, in the workshop, or in the counting-house, might be enabled, at a moment's warning, to open its leaves and point directly to the very page, section, and line, which would elucidate the darkest case, solve the most abstruse legal problem, clearly define his rights, and prescribe the exact remedy for his wrongs. It is scarcely necessary to say that all such notions are but the chimeras of ignorance and folly, or the fancies of a spirit more reprehensible and more to be deprecated than ignorance and folly conjoined. The features and forms of men are not more diverse than their minds—and their business transactions are as ever-varying as their mental and moral characters. One man views the same object, whether physical, or moral, or legal, in a different light from another—no two men ever do the same thing in precisely the same way—perhaps no two cases ever arose without a shade of difference between them; and until you can cast the forms and features of all men in the same mould, reduce the operations of their minds to the same uniform level, and endow each individual with the same moral sense and the same intellectual faculties, you may expect nothing less than diversity in their modes of business, in their bargains and sales, their contracts, conveyances, and testaments, and their manifold devices for the perpetration of fraud and of crime. To undertake, by statute or by code, to establish a just and accurate rule for every contingency of human avarice and of human passions, and for all the endless phases of varied life, is to essay a task which never yet was accomplished—a task which, until the Almighty shall change the nature and attributes of man, must for ever remain equally impracticable and absurd. In truth, all the provisions of constitutions, and statutes, and codes, are but pebbles on the sea-shore—the vast ocean of legal science lies beyond. The most, therefore, that can be expected from the present Legislature is, to set the machinery of government in operation in all its departments, establish a system of pleadings and practice, enact certain statutes providing for the most common cases of judicial investigation; and for the rest, resort to one of the two great repositories of legal learning, the Common or the Civil Law.

The question naturally presents itself here, What is the Common Law?

what the Civil Law? and what the distinction between them? The several divisions of this question we shall now proceed to answer in their order.

The Common Law is that system of jurisprudence which, deducing its origin from the traditionary customs and simple laws of the Saxons, becoming blended with many of the customs and laws of the Normans, enriched with the most valuable portions of the Civil Law, modified and enlarged by numerous Acts of the English Parliament, smoothed in its asperities and moulded into shape by a succession of as learned and wise and sagacious intellects as the world ever saw, has grown up, during the lapse of centuries, under the reformed religion and enlightened philosophy and literature of England, and has come down to us, amended and improved by American Legislation, and adapted to the republican principles and energetic character of the American people. To that system the world is indebted for whatever it enjoys of free government, of political and religious liberty, of untrammelled legislation, and unbought administration of justice. To that system do we now owe the institution of trial by jury, and the privileges of the writ of Habeas Corpus, both equally unknown in the Civil Law. Under that system all the great branches of human industry—agriculture, commerce, and manufactures—enjoy equal protection and equal favor; and under that, less than under any scheme ever devised by the wisdom of man, has personal liberty been subject to the restrictions and assaults of prerogative and arbitrary power.

The Civil Law, on the other hand, is that system which, based upon the crude laws of a rough, fierce people, whose passion was war, and whose lust, conquest—received, in its progress through the various stages of civilization from barbarism to refinement, a variety of additions and alterations, from the Plebiscita of the Roman Plebeians, from the Senatus-consulta of the Roman Senate, from the decrees of Consuls and Tribunes, from the adjudications of prætors, from the responses of men learned in the laws, and from the edicts and rescripts of the tyrants of Rome, until, in the early ages of Christianity, the whole chaotic mass was, by the order and under the patronage of the Emperor Justinian, systematized, reduced into form, and promulgated for observance by the Roman people, in the shape of four books called the Institutes, fifty books known as the Pandects, and certain additional edicts designated as the Novels of Justinian. Thereafter, and until the final downfall of the Eastern Empire of Rome, the Justinian code furnished the guide for legal tribunals throughout the provinces subject to the Imperial sway, in all cases political, civil, and criminal, except so far as particular decisions were commanded, annulled, or modified by the will of despotic power. But, as, century after century, wave upon wave of Northern barbarism poured down on the effeminacy of Southern Europe, sparing in its course neither the intellectual nor the material monuments of civilization, the administration of Roman law was, city after city, and province after province, gradually obliterated, at the same time, and to the same extent, that Roman power was crushed, and Roman institutions demolished. The whole

system of Justinian was at length swept from the face of the earth, or buried in the recesses of cloisters, alike forgotten and unknown. In the twelfth century, however, a copy of it was accidentally discovered at Amalfi, in Italy; and, owing to the arbitrary nature of some of its provisions, as well as to the wisdom and excellence of its general features, it was seized upon with avidity by the clergy, as favorable to their spiritual authority, and by monarchs, as conducive to the support of their despotic power. It was at once taught in the schools, studied in the convents, sanctioned by kings, and commended by the Holy Father himself, who held the keys of heaven. In a few years it became the prevailing system of laws throughout most of that portion of Europe, in which the founder of Christianity was respected, and the saints and martyrs adored. Thus, as in earlier times, the fine arts, literature, philosophy, and graceful superstitions of Greece, had captivated the rude minds and softened the stern natures of the Roman people; so, centuries afterwards, the refined system of Roman jurisprudence overthrew the uncouth customs and ill-digested laws of its conquerors, and led captive kings and nobles, clergy and laity, in the progress of its triumphal procession. With the exception of England alone, the code of Justinian became engrafted upon the local institutions of each separate principality and kingdom, and constituted a general system of European law; but, neither the favor of kings, the denunciations of priests, nor even the fulminations from the Papal See itself, could induce the English barons, the English courts, or the English people, to receive it as a substitute for their own favorite and immemorial customs. At this early period, then, when the dawn of a new civilization was just beginning to burst upon the world, the kingdoms of Europe, though united in religious superstitions, were divided in reverence for laws. That division has continued to the present day; and has also extended over the islands and continents, not then known, but since discovered and occupied. Wherever the English flag has been unfurled upon a savage or hostile shore, possession has been taken in the name of its sovereign, and in behalf of its laws; and upon whatever coast an English colony has been planted, there also have the colonists established the Common Law, and have ever afterwards clung to it as the birthright of themselves and their children, with a tenacity that no power, no suffering, no fear of danger, no hope of reward, could induce them to relax. In the same way has the Roman or Civil Law gone hand in hand with the extended dominion of the continental nations of Europe. Thus it happens that, at the present time, the whole christianized world is ruled by one system or the other. England, her colonies in all parts of the globe, and the United States, with the exception of Louisiana, adhere to the Common Law; whilst, excepting Russia and Turkey, the nations on the continent of Europe, Mexico, Guatemala, all the republics of South America, together with the empire of Brazil, maintain the supremacy of the Civil Law, with certain restrictions, limitations, and additions, necessary to adapt it to the peculiar organization of each particular state.

Having thus endeavored to convey a general idea of the two systems in question, we come now to speak more particularly of some of the differences existing between them. And in so doing, we propose barely to call the attention of the Senate to a few leading characteristics and results, without attempting to trace them out through their remote and manifold and intricate consequences.

To commence, then, with the domestic relations. The Civil Law regards husband and wife, connected it is true by the nuptial tie, yet disunited in person, and with dissevered interests in property. It treats their union in the light of a partnership, no more intimate or confiding than an ordinary partnership in mercantile or commercial business. Whereas, the Common Law deems the bond which unites husband and wife, so close in its connection, and so indissoluble in its nature, that they become one in person, and for most purposes one in estate. At the same time, it puts the burden of maintenance and protection where it rightfully belongs, and makes the husband, in truth and reality, the head of the household. The concessions which it makes to the wife, in respect to property, by compelling the payment of her debts and vesting her with an estate and dower, are a full compensation for the sacrifices which it requires her to make, and an ample equivalent for the communion of goods allowed her by the Civil Law. The result is, that in no country has the female sex been more highly respected and better provided for—no where has woman enjoyed more perfect legal protection, or been more elevated in society; and nowhere has the nuptial vow been more sacredly observed, or the nuptial tie less often dissevered, than in the Common Law countries—England and the United States.

The Civil Law holds the age of majority in males, for most of the ordinary purposes of life, at twenty-five years. Even after this, the son continues in many respects subject to parental authority until it is dissevered in one of six specified modes. This system retains man in a continued state of pupilage and subordination from earliest infancy, until, in some cases, his locks become hoary with age. But the Common Law absolves the age of twenty-one from parental restraint, and clothes it with the complete panoply of manhood. It bids the youth go forth into the world, to act, to strive, to suffer,—an equal with his fellow man—to put forth his energies in the service of his country, or in the eager strife for the acquisition of wealth or the achievement of renown. Hence, under the latter system, the activity, the impetuosity, the talents of early manhood, stimulated by fresh aspirations of ambition, or love of gain, are, at the earliest period, put under requisition and brought into exercise, in developing the resources, and adding to the wealth and glory of a State; whilst, under the former, they stagnate for lack of sufficient inducement to action, and are to a great degree lost.

While the fundamental principles of domestic society thus differ in the two systems, an equal diversity runs throughout all the deductions therefrom; and

we are convinced that, in the several relations above noticed, and also in that of guardian and ward, contrasted with tutor or curator and pupil, there are nicer distinctions and a greater multiplicity of rules and qualifications in the Civil than in the Common Law.

Again, in relation to mercantile transactions. In the Civil Law the purchaser of property may, within the period of a certain limitation, in some countries four, and in others two years, come into court and claim, under the doctrine of lesion, that the goods purchased by him were worth only a part of the price which he paid therefor. Thus A. sells property to B. in a perfectly fair sale, without deceit or false representation. After the expiration of some months, or it may be years, B. brings suit, and alleges that he paid twice the value of the property, and compels A. to make restitution. But the Common Law in such cases, where no fraud appears, and no false representations are made, leaves each party to act upon his own responsibility, and for his own interest, as his judgment shall dictate.

But again: The Civil Law holds, under the doctrine of implied warranty, that where one article eventually proves to be of different material from, or of inferior quality to, that which the purchaser intended to buy, and supposed he was buying, he may require the vendor to refund the whole or a portion of the consideration received. Thus A. sells to B. a package of broadcloth or a bale of sheeting, both parties supposing the goods to be in perfect condition, both having the same opportunity of inspection and examination, and both equally ignorant of any defect. After the goods are removed, perhaps thousands of miles, they are ascertained to be damaged. B. then brings suit against A., and recovers upon the ground of warranty implied by law. On the other hand, the Common Law more wisely says, that if B. wished to guard against the contingency of a possible defect, he should have made it a part of the contract of sale, that A. give his express warranty of the merchantable quality of the goods. Its doctrine is *caveat emptor;* and when a trade is fairly consummated, without fraud or undue advantage, or untrue statements, the rights of the parties are fixed, and it becomes too late for retraction. In other words, the Common Law allows parties to make their own bargains, and when they are made, holds them to a strict compliance; whilst the Civil Law looks upon man as incapable of judging for himself, assumes the guardianship over him, and interpolates into a contract that which the parties never agreed to. The one is protective of trade, and a free and rapid interchange of commodities—the other is restrictive of both.

If time and space permitted, and it would not be occupying too much the attention of the Senate, we might trace the same general principle of distinction through various other departments of the two systems, through their provisions for the tenure and transfer of real estate, for the transmission of inheritances and successions, for the execution and validity of last wills and testaments and the distribution of property in pursuance of them, and for the

enumeration of the powers and duties of executors, administrators, and trustees; but we must pass them by, and hasten to other considerations, for we deem it of more consequence to understand the general scope, and tendency, and results of the two systems, than the single and isolated principles which go to make them up. We have already invited your attention to a few of their leading heads, and contrasted their strong points of difference; and in so doing have only touched upon the confines of a wide and diversified field of legal science. To follow up the infinite divisions, sub-divisions, and exceptions, of even the few branches to which we have particularly adverted, would require more time than we have had to bestow; and to run out the comparison between the various heads which we have merely designated by name, would fill volumes. We shall, therefore, leave this part of the subject, and proceed to consider various objections which are sometimes urged against the Common Law.

And first, it is claimed, that under this system the landed interest has ever prevailed over the interests of commerce, manufactures, and labor. It is probably desired that the inference should be drawn, that while the Common Law fosters and encourages agriculture, it operates to depress and impoverish commerce, manufactures, and labor, and that the Civil Law has a tendency to promote and cherish them all. The objection, if of any weight at all, is applicable only to the system as administered in England and her colonies, and not as it prevails in the United States; in other words, to the English rather than to the American Common Law. But we deny that it is of any validity anywhere. On the contrary, we maintain thnt nowhere do all these great branches of national wealth thrive as vigorously and prosper to so great an extent, as they do under the countenance and protection of the Common Law. Is there any country of the world in which wages are higher and labor less subservient to the great landed interest, than in England and the United States? If there are, we have not heard of them. It is true, that in the former, owing to a peculiar combination of circumstances, and despite the elevating principles of the Common Law, the laborer does not occupy as favorable a position as he does in the United States. But we would ask, in what country governed by the civil system, is his condition better? Every one knows, that in France, Spain, Italy, Germany, Mexico, and South America, he is depressed in the last degree. In truth, in no nook or corner of the earth, except in the United States, is labor looked upon otherwise than as degrading, and as the appropriate task of serfs; and nowhere, save under the benign influences of American Common Law, can it look up, in the midst of its toil, and say that it receives an adequate and abundant reward.

Is it otherwise in respect to manufactures? We have yet to learn that England and the United States are behind any nation of the earth in the growth and prosperity of the manufacturing interest. They are, eminently, the great manufacturers of the world. Their superiority is seen equally in the nicety

of a pin, and in the strength and power of a steam engine. Their skill is displayed, with the same success, upon a penknife and a sabre, and the excellence of their handiwork is confessed, as well in the coarser cloths for substantial use, as in the most delicate tissues.

How is it with that other department of industry, over which it is claimed that the landed interest predominates? English and American commerce enlivens every port, whitens every sea, woos every breeze. Its enterprise is not consumed by the heat of a tropical sun, nor chilled by the frosts of the frigid zone. It goes forth from every city and town, from every river, and bay, and inlet; it pushes its career wherever civilized man can penetrate; it circles the earth in quest of the necessaries and luxuries of life, and returns, at last, laden with the spoils of a whole ransacked world. Its merchants are princes—its ships palaces—its sphere, the illimitable sea. On the other hand, the commerce of Civil Law countries is confined to a limited range, and prosecuted in inferior ships. It creeps timidly along a few familiar shores, or if, occasionally, it does put forth into remoter regions, it is with a hesitating, faltering step, uncertain in its movements, sluggish in its progress, and unprofitable in its results. It is not fostered by the quickening influence of English and American law—it writhes under the petitioners' favorite system,—the spirit of life is not in it—it is dead.

If, then, the laboring, the manufacturing, and the commercial interests are in a higher state of prosperity in those countries governed by the Common, than in those under the dominion of the Civil Law, we see not how an argument can be drawn in favor of the latter against the former, on the ground that the landed interest predominates over all the others. And if the landed interest does indeed so predominate, then we have not only commerce, manufactures, and labor, but agriculture also, constituting altogether the great departments of human industry from which any nation can derive wealth and power—all enjoying more perfect protection, all better promoted and cherished and fostered, all more highly successful, under the worst administration of the Common, than under the best code founded upon the Civil Law.

It has been said by a distinguished writer upon the principles of government, that the laws of a country are fashioned after the character of its people. To a certain extent, this is true. But it is at the same time equally true, to as great an extent, that the character of a people is moulded by its laws. The two mutually act and re-act, the one upon the other, each producing gradual, though perhaps imperceptible changes, until, when generations have passed away, it becomes impossible to resolve, with any degree of accuracy, what effect the character of a people has had in the formation of its laws, or what influence the laws have had in determining the character of a people. It would be a curious, if not an instructive subject of inquiry, were it possible to arrive at a satisfactory conclusion, to ascertain how far the intellectual and moral condition of the people of those countries in which the Civil Law prevails, has

been produced by their legal system, and what influence the free principles and exact justice of the Common Law have exercised in developing the sturdy, sagacious, and self-relying spirit of the English and American people. To whatever cause it may be owing, it is nevertheless true, that with a few rare exceptions on either side, there is a strongly marked boundary between the domains of the respective systems. In the one, you perceive the activity, the throng, the tumult of business life—in the other, the stagnation of an inconsiderable and waning trade; in the one, the boldness, the impetuosity, the invention of advancing knowledge and civilization—in the other, feebleness of intellect, timidity of spirit, and the subserviency of slaves; in the one, the strength and freshness of manhood—in the other, the weakness of incipient decay. The one possesses a progressive and reforming nature—the other partakes of quietude and repose; the one is the genius of the present and the future—the other, the spirit of the past; the one is full of energetic and vigorous life—the other, replete with the memories of a by-gone and antiquated order of things. It was with views of the Civil Law like these, that Chancellor Kent, whose authority is invoked by the petitioners, says, in the eloquent language quoted by them, "that it is impossible, while engaged in the contemplation of the system, not to be struck with some portion of the awe and veneration which are felt in the midst of the solitude of a majestic ruin."

But the technicalities of the Common Law are objected to, as if there were none in the opposing system, and the whole was as simple and plain as a New England Primer. On the contrary, we take it upon ourselves to say, that for every one technicality in the former, we will point out another in the latter. We speak of the Common Law as it is now, not as it was three centuries ago, or even when Sir James Mackintosh uttered his criticisms upon it. But technicalities in any system of law, whether Common or Civil, whether the law of Moses or the law of Mahomet, are as necessary and unavoidable as they are in any other profession, art, trade, or mystery. Medicine and divinity, painting and poetry, commerce and navigation, chemistry, mineralogy, botany, and geology, all have their own peculiar and appropriate technicalities. The merchant has his; the mechanic, his; the engineer, his. A printer cannot explain the use of his types or his press, a watchmaker the construction of a watch, or a jeweler the setting of a diamond, without the use of technicalities. Nay, even the work of legislation, in which we are now engaged, has its own peculiar and indispensable terms, which are nothing but technicalities. In all these cases, instead of being objectionable, they are in the highest degree deserving of commendation. They are, in reality, labor-saving machines, enabling people to express by one significant word, what would otherwise require a tedious circumlocution. If, then, they are necessary in every department of human art and science, how can it be expected that law, the most abstruse and comprehensive of them all, shall be divested of them? The wit of man never has accomplished, and never will accomplish so difficult a task. He, therefore, who indulges in

the expectation that it may be freed from them, and reduced to such a state of simplicity that he who runs may read, and the wayfaring man need not err therein; or he, who supposes that all the principles of any civilized system of jurisprudence are so written in the heart of every man who has received a moral education, that he will be able to comprehend them without study, and apply them without hesitation or doubt—much more, he who imagines that, because a man of sense and moral culture may experience no hardship in living under a law which compels him to do what he ought to do, will find in his breast a response to all the technicalities, principles, and rules of the Civil Law, with all their multiplied divisions and qualifications, subdivisions, ramifications, and exceptions, the explanation and illustration of which have filled thousands of volumes, and occupied for centuries the life-long study and application of thousands of the wisest and most learned men of the world, is doomed to pass through life under a mistake, and will probably die with it uncorrected.

The charge of dilatoriness is also made against the Common Law. But is it true, that it is only where this system has prevailed, that courts have become odious for their wearisome delays? The very converse of the proposition supposed, is true. In all the Civil Law countries of Europe and America, with but two solitary exceptions, the courts are notorious for prolixity and dilatoriness of proceedings, and for verbosity of pleadings and process, occasioning ruinous expenses, and swallowing up whole estates in the vortex of a single litigation. And although, in former times, the courts of England were in some cases justly exposed to the censure of unnecessary delays, yet, at the present day, England and the United States are the only countries where justice is both swift and sure in the pursuit of wrong, and punishment treads closely upon the heels of crime. But the truth is, we see nothing inherent in either system which necessarily requires the intervention of long delays. In this respect, the administration of the system is of more consequence than the system itself. If we authorize but one or two terms of the several courts in a year, choose incompetent judges, and pay them the same salaries which we give to the doorkeepers of our respective legislative halls, we must expect that, enact whatever laws we may, litigation will drag its slow length along. Lowness of price implies inferiority in the quality of law, as in the quality of everything else; and it is in this view, that a cheap judiciary will always prove, in the end, the dearest of all.

It is also urged that something is due to the rights of the people who became a part of the American Union by the acquisition of California. Undoubtedly the same respect should be paid to their interests, that is awarded to all the citizens of this State. They stand upon the same level with the rest, neither elevated above nor depressed below thei: fellows; and we should be the last persons in the world to countenance the least infringement upon any of their rights. They have become citizens, like ourselves; they stand at the polls, they sit in the halls of legislation, they appear in the courts of justice, as

our equals. They will receive from the Legislature, courts, and juries, the same attentive hearing, the same fair and impartial determination of their rights, that all other citizens are entitled to claim. But if it be meant that it is due to their rights, that they should become recipients of special legislation, or should, for their exclusive benefit, have laws enacted or continued injurious or ill adapted to the best interests of the whole State, we take issue upon the allegation, and deny it. There is no just ground for supposing that their rights will not be regarded under one system as much as under the other. In Texas and Florida, both formerly Civil Law countries, the Common Law was afterwards substituted, and we are not aware that the life, liberty, and property of those who were citizens at the time of such change, have not since been quite as well protected under the latter as they had before been under the former.

Having thus endeavored to answer several objections which are sometimes urged against the Common Law, we shall now proceed to consider certain reasons which, in our opinion, render its adoption in this State peculiarly appropriate; and this, too, without especial reference to its intrinsic superiority. Nay, in this view, we are willing to concede, against our own strong and decided convictions, that the Civil Law is equally wise in its provisions, humane in its doctrines, progressive in its spirit, and susceptible of an equally expeditious administration.

We wish to remark in the outset, that we by no means concede the position, that the Civil Law is in full force in this State at the present time. It is extremely uncertain to what extent it ever did prevail. Situated at so great a distance from the Mexican capital, occupying months in the interchange of communications with that central point of law and legislation, connected with it by the fragile tie of common descent, rather than by any intimate communion of interests or sympathy of feeling, exposed to frequent revo'utions of the general and departmental governments, finding but little stability in the Mexican Congress, little convenience for the promulgation of its laws, and less power to enforce them, the people of California seem to have been governed principally by local customs, which were sometimes in accordance with the Civil Law, and sometimes in contravention of it. However this may be, it is very certain, that it now prevails to but a limited extent, and equally certain, that the Common Law controls most of the business transactions of the country. The American people found California a wilderness—they have peopled it; they found it without commerce or trade—they have created them; they found it without courts—they have organized them; they found it destitute of officers to enforce laws—they have elected them; they found it in the midst of anarchy—they have bid the warring elements be still, have evoked order out of confusion, and from the chaotic mass have called forth a beautiful creation. Throughout all this, they have taken the Common Law, the only system with which they were acquainted, as their guide. Their bargains have been made in pursuance of it—their contracts, deeds, and wills have been drawn up and exe-

cuted with its usual formalities—their courts have taken its rules to govern their adjudications—their marriages have been solemnized under it—and, after death, their property has been distributed as it prescribes. Are you to hold all or a great portion of these things as naught? Will you overturn or invalidate the immense business transactions of a great community? And yet, to this must you come, if you say that the Civil Law is in force throughout the State. The first settlers of the United States brought with them from the mother country the Common Law, and established it in an uninhabited region. The emigrants to California have brought with them the same system, and have established it in a country almost equally unoccupied. If a change therefore is made, it must be a substitution of the Civil Law in place of the Common Law. If you sanction the latter by legislative enactment, you only give your authority to what has already been done in anticipation of such authority.

But the precedent of Louisiana, in which the Civil Law prevailed at the time of its cession to the United States, may possibly be cited as a parallel case. The analogy, however, does not hold good. There existed in Louisiana, at the time of its acquisition, a government in full operation in all its departments, a system of laws regularly and effectually administered, and a population large in comparison with the first influx of American settlers. The immigration there was, at first, but a trifling rill, creeping languidly to the river, and it has continued to increase but gently and moderately down to the present time. The American population there have thus, gradually and imperceptibly, accommodated themselves to the habits, and adopted the customs and laws of a community which they found, at the respective periods of their settlement, completely organized, and consisting of much greater numbers than themselves. In confirmation of this, we have barely to call your attention to the fact, that the immigration to Louisiana from the United States, during a course of some forty-seven years, has not probably been greater than that which has flooded California during the short period of one year. Here we have, indeed, had no insignificant stream, lost in the ocean, without its feeble tribute being perceived; it has been, and still continues, the broad, deep, rushing torrent, suddenly pouring down upon and inundating a whole region of country.

The petitioners ask, in substance, for the adoption of the English definition of crimes, the English Law of Evidence, the English Commercial Law, and the Civil Code of Louisiana. Without doubting that a harmonious and symmetrical system might be deduced from them all, by the long and patient labor of years, of men fully adequate to the task, we must, nevertheless, be allowed to suggest our opinion, that were we to attempt to adopt them, as they are, without more labor devoted to reconciling their jarring provisions than any Legislature would have either the will or the time to bestow, we should have a system of laws which would be no system at all—a system of contradictions and absurdities—a rule here conflicting with a rule there—the same principles thrice reiterated, and each time in different terms, and in a new shape.

But there are additional reasons of still greater cogency for the adoption of the Common Law. Of the thirty States in the Union, twenty-nine are governed by the Common, and one by the Civil Law. More than twenty-nine thirtieths of the citizens of the United States have been brought up under, and accustomed to transact their business in conformity with, the principles of the former system. More than twenty-nine thirtieths of the emigration to this country, is from Common Law States; and an equal proportion of the business of our people, is now, and will continue to be, carried on by Common Law men. If you change this system, which, in all ordinary matters, they sufficiently understand, you draw a cloud of doubt and uncertainty over every department of business. In the most familiar transactions, as well as in those of graver import, merchants, mechanics, farmers, speculators, and miners, will hesitate in taking a single step, without having first been put to the trouble and expense of consulting a lawyer, to ascertain whether the contemplated matter, or the particular method of doing it, well known by them to be valid under the Common Law, would not, under the Civil system, prove an utter nullity, or require a different mode of performance. Indeed, if the legal profession were in reality, as the ignorant and prejudiced sometimes allege, composed of a mercenary class, seeking their own emoluments, and regardless of the general and permanent welfare and convenience of the whole community, there is nothing which they ought so ardently to desire as the granting of the prayer of the petitioners; for, in that event, their offices must be thronged by clients to repair blunders already committed, to prosecute or defend suits occasioned by such blunders, or to procure legal opinions in advance, whether a contract or instrument, requiring by the Common Law a well known method of execution, or a compliance with certain definite rules, would not, in the Civil Law, demand another mode of execution, or a compliance with other, or different, or additional rules. Nay more, and worse—the best lawyers in the State, though having a general acquaintance with the Civil system, yet not being possessed of accurate and critical knowledge of its minute and practical details, would be in doubt how to advise their clients; and your judges, educated under the Common Law, and perhaps competent to administer it creditably, would not know how to decide *according to law*, but would be obliged to base their judgments either upon the system with which they are familiar, or upon their own abstract notions of right or wrong in every case. The community would thus be exposed to the exercise of discretionary and arbitrary judicial power, and would find themselves in a condition which a profound writer upon law has declared to be the very worst phase of civilized society—that in which the laws are vague and uncertain.

Closely in connection with the foregoing remarks, occurs another which we deem deserving of very great consideration. Books are to a lawyer or a judge what tools are to a mechanic, or surgical instruments to a surgeon; and it is important that such books should be cheap, accessible, and convenient for use;

and highly appropriate, if not indispensable, that they should exist in the native language of the American people. Adopt the Common Law, and lawyers, and judges, and the community at large can readily procure all necessary books, at a moderate price, in their own tongue, and bearing the venerated names and containing the extensive learning of such jurists as Blackstone and Chitty, Story and Kent, together with the reported decisions of all the eminent judges in England and the United States, headed by the illustrious Mansfield and Marshall. The names of such men are to every American amongst us familiar as his land's language; they are connected with his earliest associations of business and study—are endeared to him by a thousand recollections—and constitute many bright links in the chain of memory which binds him to the land and the institutions of his fathers. On the other hand, substitute the Civil for the Common Law, and it will be with great delay and expense, in limited supplies, and in strange tongues, that books can be procured which will be found absolutely necessary for the lawyer and the judge in the intelligent administration of the system. The Louisiana Reports, a few copies of translations of the Institutes, and perhaps of the Pandects, and of the works of Pothier and Domat, may perhaps be procured by diligent search. Beyond this you will, for the most part, be obliged to resort to the original works upon the Civil Law, written in the Spanish, Italian, French, German, and Latin languages, which, if they can be found at all in the United States, will have to be ferreted out amongst the dusty volumes of some antiquarian bookseller, and can be purchased only at an exorbitant price; and, in order to clear up a disputed point, to elucidate a novel question, or deduce new corollaries from old principles, it will become necessary to refer back to works existing only in a foreign language, to names strange to an American ear, to Escriche and Febrero, to the Nueva and Novissima Recopilaciones, to the Partidas, to the Fuero Real of Alonzo the Wise, and perhaps even to the Fuero Juzgo of his Gothic predecessors.

But, finally, another reason which we would urge in behalf of the Common Law is, that we may have a system which will be satisfactory to the people, and therefore permanent. A continual fluctuation in the fundamental laws of any country, is a great calamity. A sudden and radical alteration of them, is even more difficult to be carried into effect, than a fundamental and violent change in the political organization of the government. A system of laws always becomes inseparably interwoven and intimately blended with the character of the community, reared under and habituated to them. A substitution so great as would be that of the Civil for the Common Law, of a whole system, so radical and entire, and over a community so extensive and homogeneous as the American population of California, though often attempted, has never yet once met with success. You might as well undertake to eradicate the American character, and plant the Mexican in its stead—to substitute the Catholic for the Protestant religion, by statute—to abolish the English language and sanction

none but the Spanish, by legislative enactment; for the laws, not less than the character, religion, and language, constitute part and parcel of the American mind. We apprehend that any such attempt, if made, would in due season be answered by the people, as the bishops were answered by the sturdy barons of England at Merton, when a similar effort was made to impose upon them a part of this same system of Rome, "We will, that the laws of England be not changed."

We have thus endeavored to present before you some of the reasons which impressed the minds of your Committee that the prayer of the petitioners should not be granted. In so doing, we have necessarily been led into a more lengthened review than at first we anticipated. We have wished to discharge the duty imposed upon us by the Senate in a manner somewhat commensurate with what we have deemed the importance of the subject. We have conceded that the Civil Law has great merits, and displays great wisdom; but we have insisted that the Common Law is congenial with the American character, and the character suited to the law, and that, in this mutual adaptation, consists the excellence of each.

Your Committee, therefore, recommend the establishment of the system of pleadings and practice which has already been laid before you; the prompt organization of the Courts, with not less than six terms of the District and County Courts of San Francisco in each year, and not less than four terms in each of the other counties of the State; the immediate passage of a bill erecting a municipal Court for San Francisco, with three Judges, and one term every month; the enactment of statutes providing for the tenure and transfer of real estate, for the recording of deeds and mortgages, for the practice upon writs of habeas corpus, and in other special proceedings, with such other legislation connected therewith as may be deemed necessary; and then a statutory provision, that all laws heretofore in force be abolished; and that, in cases not falling within the Constitution of the United States, or the Constitution or statutes of this State, the Courts shall be governed in their adjudications by the English Common Law, as received and modified in the United States; in other words, by the AMERICAN COMMON LAW.

They, therefore, herewith return the petition referred to, and respectfully ask to be discharged from the further consideration thereof.

All of which is respectfully submitted.

By order of the Committee.

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1. Where a special contract for the performance of work is proved, but it is also shown that the contract has been deviated from, the judgment will not be reversed on the ground that the court below admitted testimony as to the value of the plaintiff's services. *De Boom* v. *Priestly*, 206

2. Where there has been a special contract to erect a building at a specified price, and according to an agreed plan, and the contract is afterwards deviated from by consent, the plaintiff cannot recover upon the express contract; for the reason that the work has not been performed according to the terms of the express contract; though, at the trial, the measure of compensation must be graduated by the terms of the contract, so far as the work can be traced under it. *id*

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3. The rule laid down in *Payne* v. *The Pacific Mail Steamship Company*, (*ante*, *p.* 33,) approved. *id*

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5. The finding of a jury, or of the court below, acting as a jury, upon a question of fact, is final and conclusive. *Perry* v. *Cochran*, 180

6. A contract for the sale of goods, for the price of two hundred dollars or over is void; unless a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged therewith; or, unless the buyer shall accept or receive part of such goods; or, unless the buyer shall at the time pay some part of the purchase money; but *Held*, where the evidence given at the trial did not appear to be fully returned, and there appeared to have been no objection raised or exception taken to the insufficiency of the evidence, that this court would presume that sufficient evidence of a proper character was given to warrant the finding of the jury. *Bunting* v. *Beideman*, 181

7. This court will not disturb the verdict of a jury where nothing appears upon the record of the proceedings at the trial, except conflicting evidence upon a question of fact submitted to, and passed upon, by the jury; and the finding of the court below upon a question of fact will be regarded in the same light as the verdict of a jury. *Vogan* v. *Barrier*, 186

8. It *seems*, that where the verdict is clearly contrary to evidence, this court may reverse the judgment on that account. *Acquital* v. *Crowell*, 191

9. Where it is apparent that, in case a new trial should be granted, the verdict of the jury must be in favor of the plaintiff, the judgment of the court below in favor of the plaintiff will not be disturbed. *Tohler* v. *Folsom*, 207

10. Where a judgment is founded in part on incompetent evidence, it will be reversed on appeal, unless it can be clearly seen that the improper evidence could have had no influence on the minds of the jury. *Mateer* v. *Brown*, 231

11. A jury should make up their verdict from the facts according to the law as given to them by the court: and it *seems*, that it is improper for a court to charge the jury "to take into consideration all of the facts and do equal justice between the parties;" inasmuch as an instruction so general in its terms may mislead them. *Per* Hastings, Ch. J. *Kelly* v. *Cunningham*, 365

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13. Where there is conflicting evidence upon a point submitted to, and passed upon by a jury, their verdict will not be disturbed; and the same rule applies where a question of fact is submitted to the *court without a jury*. *Hoppe* v. *Robb*, 373

14. Where the evidence given on the trial of a cause is conflicting, and no legal point has been improperly ruled by the court, the verdict of a jury is conclusive. *Dwinelle* v. *Henriquez*, 387

15. Instructions of the court to the jury must all be taken together, and if, when thus viewed, the case appears to have been fairly presented to the jury, the verdict will not be disturbed. *id*

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